TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 261.

BERNARD L. MEISTER, PLAINTIFF IN ERROR,

vs.

F. S. BISSELL, JOSEPH KAUFMAN, SIMON KAUFMAN, AND MOSES OPPENHEIMER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

FILED OCTOBER 20, 1875.

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1 United States circuit court for the western district of Pennsylvania.

Appearance docket entries.

Ferguson & Murray and Weir & Gibson.

BERNARD L. MEISTER, A CITIZEN OF THE State of Michigan,
vs.
F. S. BISSELL, JOSEPH KAUFMAN, SIMON Kaufman, and Moses Oppenheimer, citizens of the State of Pennsylvania.
No. 46. Nov'r term, 1873.

J. S. & A. P. Morrison, M. W. Acheson, S. Schoyer j'r.

Summons in ejectment, issued October 9th, 1873, returnable to the first Monday of November next, for all that certain lot of ground situate in the city of Pittsburgh, Allegheny County, and State of Pennsylvania, bounded and described as follows, to wit:

Beginning on Penn street, at the corner of lots Nos. 100 and 101 in Wood's general plan of Pittsburgh; thence eastwardly, along Penn street, 30 f't; thence southwardly, parallel with the division line of said lots Nos. 100 and 101, a distance of 120 f't; thence westwardly, parallel with Penn st., 30 f't to the line of said lot No. 101; and thence, by the same, 120 f't, to the place of beginning; the right of possession or title to which he, the said Bernard L. Meister, says is in him and not in said F. S. Bissell, Joseph Kaufman, Simon Kaufman, and Moses Oppenheimer; all of which he, the said Bernard L. Meister, avers he is prepared to prove.

2 October 17, 1873.—Served summons personally & by copy upon Joseph Kaufman, Simon Kaufman, and Moses Oppenheimer, and personally and by copy upon F. S. Bissell. Mar., $10.00.

And now, Nov'r 29, 1873, by direction of the plaintiff's counsel, and in pursuance of the rules of this court, I hereby enter the plea of not guilty.—H. D. Gamble, cl'k.

April 8, 1874.—Rule and interrogatories for commission to Luther Beckwith, of Bay City, Michigan, filed. Same day copy of same served upon J. S. & A. P. Morrison.

April 23, 1874.—Cross-interrogatories filed.

April 24, 1874.—Commission mailed to commissioner named.

May 2, 1874.—Affidavit of B. Darlington filed.

And now May 2, 1874, on motion of defendants' counsel, this case continued at their cost, to be tried at the next Nov'r term.

And now May 2, 1874, on motion of def'ts' counsel, the court order the plaintiff to give security for costs in this case, all proceedings in the mean time stayed, rec. reg.

August 7, 1874.—Depositions taken before Luther Beckwith, esq., of Michigan, received, and notice having been given are filed.

August 22, 1874.—Exceptions to the execution and return of the commission issued to Luther Beckwith, esq., in this case filed; also, notice of filing exceptions, and acceptance of service thereon, filed same day.

August 26, 1874.—Bond for costs, filed.

August 31, 1874.—Rule and interrogatories for a commission to issue to Luther Beckwith, esq., of Bay City, Michigan, to take depositions of witnesses, with acceptance of service thereon filed.

3 1874, September 11.—Notice of application for rule to show cause on part of defendants why the depositions on part of plaintiff, taken in pursuance of a commission issued in this case on behalf of plaintiff, on the 24th day of April, 1874, should not be suppressed, and for an order of court to set aside the rule entered in this case on the 31st day of August, 1874, for a commission on part of the plaintiff, with acceptance of service by plaintiff's attorneys endorsed thereon, filed.

Sept. 12, 1874.—The rule to set aside the rule for a commission on behalf of plaintiff, entered on the 31st day of August, 1874, and to suppress deposition, is continued until Saturday, Sept. 19, at 10 a. m. Petition for rule filed.

Sept. 12, 1874.—Rule granted to show cause why a dedimus potestatem to take depositions viva voce at the instance of either party should not issue; rule returnable Sept. 19, 1874, at 10 a. m.

And now, to wit, Sept. 12, 1874, the following petition was read in open court, and was argued by counsel, and thereupon, upon consideration thereof, the prayer of the petition was granted, and the rule for a commission on behalf of plaintiff, entered August 31, 1874, is set aside. And it is further ordered that a dedimus potestatum to take depositions, pursuant to act of Congress, be granted in this case, at the instance of plaintiff or defendants; and the court authorizes the appointment of commissioners and interpreters, to be named by the parties respectively, subject to the approval of the court, and directs that all depositions shall be taken viva voce by the commissioners thus named, after reasonable notice; same day, rule to suppress depositions made absolute.

4 Sept. 12, 1874.—On motion, plaintiff's attorneys have leave to withdraw and take from the depositions on file the exhibits, photograph and ambrotype of W'm Mowry.

Oct. 12, 1874.—Notice of trial, with acceptance of service thereon, filed.

Nov. 12, 1874.—Affidavit of Benj. Darlington filed (in No. 45, May T., 1874).

Nov. 27, 1874.—Order allowing a venire to issue for 42 special jurors, returnable on the 9th day of Dec., 1874. (See No. 45, May T., 1874.)

Dec. 9, 1874.—The parties in this case being at issue, a jury was called, who came, viz, T. H. Grayson, George L. Wiley, C. H. Gilfillin, John C. Flenniken, G. Clark, Smith Fuller, George W. Hamilton, W'm H. Humes, R. B. Carnahan, John N. McDonald, J. B. Sweitzer, and Alex. Reynolds, twelve good and lawful men, who, having been duly sworn, summoned, and returned, were balloted for, empanneled, and sworn; and, the jury being in the box, the parties proceeded to offer evidence.

Dec. 21, 1874.—This case having been proceeded with from day to day, the evidence having been heard, the arguments upon the questions of law having been heard and considered, and the jury having heard the charge of the court, said: "We find for the defendants, and so we all say;" same time request of plaintiff to the court, with ruling of court thereon, filed.

January 6, 1875.—Defendants' bill of witnesses' costs filed.

January 6, 1875.—Notice of taxation of costs in this case, returnable Jan'ry 11, 1875, at 3 p. m., served on John S. Ferguson and M. W. Acheson.

Jan'ry 13, 1875.—Upon motion of defendants' attorney, judg-
5 ment is entered upon the verdict.

February 6, 1875.—Plaintiff's exceptions to defendants' bill of witnesses' costs filed.

March 8, 1875.—Writ of error filed; allowed January 13, 1875.

March 8, 1875.—Plaintiff's offers, A, C, D, E, and F, also defendants' offers, No. 1, 2, 3, 4, and 5 filed.

January 17, 1875.—Citation allowed and issued.

July 23, 1875.—Citation served upon M. W. Acheson, esq., attorney of record for defendants, by leaving with him a true copy thereof, and having him write his acceptance of service thereon.

6 *Precipe for summons.*

In the circuit court of the United States for the western district of Pennsylvania.

BERNARD L. MEISTER, A CITIZEN OF THE State of Michigan,
vs.
F. S. BISSELL, JOSEPH KAUFMAN, SIMON Kaufman, and Moses Oppenheimer, citizens of the State of Pennsylvania.
No. 46. Nov'r term, 1873.

Issue summons in ejectment against defendants, commanding them to appear and answer to a certain complaint made by Bernard L. Meister, a citizen of the State of Michigan, that F. S. Bissell, Joseph Kaufman, Simon Kaufman, and Moses Oppenheimer have in their actual possession a certain lot of ground, situate in the city of Pittsburgh, Allegheny County and State of Pennsylvania, bounded and described as follows, to wit:

Beginning on Penn street, at the corner of lots Nos. 100 and 101, in Wood's general plan of Pittsburgh; thence eastwardly along Penn street 30 feet; thence southwardly parallel with the division line of said lots Nos. 100 and 101 a distance of one hundred and twenty feet; thence westwardly parallel with Penn street 30 feet to the line of said lot No. 101; and thence by the same 120 feet to the place of beginning; the right of possession or title to which he, the said Bernard L. Meister, says is in him, and not in said F. S. Bissell, Joseph
7 Kaufman, Simon Kaufman, and Moses Oppenheimer; all of which he, the said Bernard L. Meister, avers he is prepared to prove, &c. Returnable to the next return day.

Oct. 9, 1873.

FERGUSON & MURRAY,
Att'y for Pl'ff.

To H. D. GAMBLE, Esq., *Clerk*, &c.

8 *Summons.*

UNITED STATES,
Western District of Pennsylvania, set:

The President of the United States to the marshal of the western district of Pennsylvania, greeting:

We command you that you summon F. S. Bissell, Joseph Kaufman, Simon Kaufman, and Moses Oppenheimer, citizens of the State of Pennsylvania, late of your district, if they may be found therein, so that they be and appear before the judges of the circuit court of the United States in and for the western district of Pennsylvania, in the third circuit, at a session of the same court to be holden at Pittsburgh on the first Monday November next, to answer to Bernard L. Meister, a citizen of

the State of Michigan, for all that certain lot of ground situate in the city of Pittsburgh, Allegheny County, Pennsylvania, bounded and described as follows, viz:

Beginning on Penn street at the corner of lots Nos. 100 and 101, in Wood's general plan of Pittsburg; thence eastwardly along Penn st. 30 f't; thence southwardly parallel with the division line of said lots Nos. 100 and 101 a distance of 120 f't; thence westwardly parallel with Penn st. 30 f't to the line of said lot No. 101; and thence by the same 120 f't to the place of beginning; the right of possession and title
9 to which the said Bernard L. Meister says is in him, and not in the said F. S. Bissell, Joseph Kaufman, Simon Kaufman, and Moses Oppenheimer; all of which he avers he is prepared to prove.

And have you then there this writ.

Witness the honorable Nathan Clifford, senior associate justice of the Supreme Court of the United States, at Pittsburgh, this 9th day of October, A. D. 1873, and in the 98th year of the Independence of said United States.

[SEAL.] H. D. GAMBLE, *Clerk.*

Service of summons.

OCTOBER 17, 1873.

Served personally and by copy upon Joseph Kaufman, Simon Kaufman, and Moses Oppenheimer, and Oct. 28, 1873, served personally and by copy upon F. S. Bissell.

JOHN HALL, *U. S. M.*,
Per J. R. BLACK.

Plea.

BERNARD L. MEISTER } No. 46. Nov'r term, 1873.
vs.
F. S. BISSELL ET AL. }

And now, Nov'r 29, 1873, the defendants plead not guilty.

H. D. GAMBLE, *Clerk.*

10 *Jury.*

BERNARD L. MEISTER } No. 46. Nov'r term, 1873.
vs.
F. S. BISSELL ET AL. }

Jury.

DECEMBER 9, 1874.

The parties in this case being at issue, a jury was called, who came, viz, T. W. Grayson, George L. Wiley, C. W. Gilfillin, John C. Flennikin, Geo. Clark, Smith Fuller, Geo. W. Hamilton, William H. Humes, R. B. Carnahan, John N. McDonald, J. B. Sweitzer, and Alexander Reynolds, twelve good and lawful men, who, having been duly summoned and returned, were balloted for, empanneled, and sworn.

And, the jury being in the box, parties proceeded to offer evidence.

11 *Offers by plaintiff, and objections by defendants.*

BERNARD L. MEISTER
vs.
F. S. BISSELL ET AL.

A.

Plaintiffs now propose to prove by the witness on the stand (Michael Daily) that William Mowry and Mary (Pero's daughter) lived and cohabited together, and that in the community in which they resided they were reputed and recognized to be husband and wife.

The defendants' counsel object to the latter part of the above offer, to wit, the following portion, "and that in the community in which they resided they were reputed and recognized to be man and wife;" 1st, as incompetent and irrelevant generally; 2nd, that the witness has already testified that Mowry and the squaw were residing not in a white but in an Indian community.

Objection sustained, and exception by pl'ff.

W. MCKENNAN, *Cir. J.*

12 C.

Plaintiff's counsel propose to ask the witness whether or not, at the time she gave William Mowry's picture to their daughter Elizabeth, she told her whose picture it was.

Defendants' counsel objects to the evidence as incompetent and irrelevant.

Objection sustained, and exception by pl'ff.

W. MCKENNAN, *Cir. J.*

D.

Plaintiff's counsel propose to follow the evidence now in, and show, through the witness now on the stand and others, that the two strange ladies mentioned by the witness were M'r's Birney and M'r's Feby Hogh, and the latter being of kin of William Mowry and his mother, that they wanted the witness to give her daughter, Elizabeth Mowry, to them to take away to her grandmother's, and offered the witness money at the same time.

Objected to by defendants' counsel as incompetent and irrelevant.

Objection sustained, and exception by pl'ff.

W. MCKENNAN, *Cir. J.*

13 E.

Plaintiff's counsel now propose to prove by the witness (Elizabeth Isaacs), [that her mother gave her the picture shown witness, when witness was a little girl, and before the present controversy arose], and told witness that it was the picture of her father, William Mowry; that he was a white man and was dead, and that he' mother often talked to her about him.

The defendants' counsel does not object to the witness stating that her mother gave her the picture when she was a little girl, but they do object to the residue of the offer as incompetent and irrelevant.

That part of the offer in brackets is already in evidence from the

mouth of this witness, and without objection. The latter part of the offer, relating to the declarations of the witness's mother, is rejected, and exception by pl'ff.

W. McKENNAN, *Cir. J.*

F.

Plaintiff's counsel now propose to show by the witness (Elizabeth Isaacs) that her grandfather Pero, now dead, talked to her frequently about he' father, and told her that he was a white man, and that his name was William Mowry.

14 The defendants' counsel object to this offer as incompetent and irrelevant.

Objection sustained, and exception by pl'ff.

W. McKENNAN, *Cir. J.*

15 *Offers by defendants and objections by plaintiff.*

BERNARD L. MEISTER }
vs.
F. S. BISSELL ET AL. }

No. 1.

The defendants' counsel offer in evidence the laws of the Territory of Michigan of 1833, and also the revised statutes of the State of Michigan of 1838 and 1846, and the compiled laws of 1857 and 1871, containing the laws then in force of 1838 and 1846, for the purpose of showing the law regulating marriage as the same has always prevailed in said Territory and State from 1833 to the present time, the volumes offered showing on their face that they have been published by the authority of the Territory and State of Michigan.

Plaintiff's counsel object to the above offer, as follows:

1st. The Territorial laws of Michigan are no longer in force, and have not been since the admission of Michigan as a State.

2nd. The statutes as offered are not properly authenticated.

3rd. The laws, except as they existed at the time of the alleged marriage, are irrelevant.

Objection overruled, and evidence admitted.

Exception by pl'ff.

W. McKENNAN, *Cir. J.*

16 No. 2.

The defendants' counsel propose to show by D'r James Robinson, the witness on the stand, that he was very intimate with W'm Mowry, and that said Mowry spoke to the witness about the Indian woman Missquawassum during the time of his cohabitation with her, as alleged by the plaintiff, and that said Mowry spoke of said woman uniformly as his "squaw," and never as his wife; that he spoke to the witness of his squaw he kept in Michigan, and told him that all the young white men at Saginaw kept squaws.

Plaintiff's counsel object to the proposed testimony as irrelevant and incompetent.

The objection is overruled, and evidence admitted.

Exception by pl'ff.

W. McKENNAN, *Cir. J.*

No. 3.

Defendants' counsel make the following offer:

The plaintiff's witnesses having testified to the declarations of William Mowry that he was married "Indian fashion," and in the "Indian way," the defendants propose to show by this and other witnesses that the customs among the Indians, and especially the Chippewas,
17 were, at the time of Mowry's alleged marriage with Missquawassum, in respect to commerce between the sexes, and that their so called marriages were dissolvable at the will of either party; and, further, that they were polygamous, the husband having the privelege of taking as many wives as he pleased.

Plaintiff's counsel object to that part of the above offer which alleges that plaintiff's witnesses testified to declarations by Mowry of marri'ge in "Indian fashion," or the Indian way, because it was no part of the plaintiff's testimony, but was brought out on cross-examination; generally, that the offer is incompetent and irrelevant.

Objection overruled and evidence admitted.

Exception *to* plaintiff.

W. McKENNAN, *Cir. J.*

No. 4.

Defendants' counsel call W'm M. Darlington, and propose to show by him that Schoolcraft's "Information respecting the History, Condition, and Prospect of the Indian Tribes of the United States," collected and prepared under the direction of the Bureau of Indian Affairs, is
18 high authority upon the subjects treated of in said work, and is universally recognized as such in the United States and Europe, the same to be followed by an offer of volume second of said work, title, "Constitution of the Indian Family," pages 48, etc.

Plaintiff's counsel object to the offer as incompetent and irrelevant.

Objection overruled, and exception by plaintiff.

W. McKENNAN, *Cir. J.*

No. 5.

Defendants' counsel offer in evidence volume second, title "Constitution of the Indian Family," page 48, etc., of Schoolcraft's "Information respecting the History, Condition, and Prospects of the Indian Tribes of the United States," collected and prepared under the Bureau of Indian Affairs, and published by authority of Congress, for the purpose of showing the temporary and polygamous character of Indian marriages among the Chippewas and other northern tribes of Indians.

Plaintiff's counsel object to the offer as incompetent and irrelevant, being hearsay, without opportunity to cross-examine the writer
19 as to his means of knowledge.

Objection overruled, and exception by plaintiff.

W'M McKENNAN, *Cir. J.*

20 *Plaintiff's points.*

MEISTER
vs.
BISSELL ET AL.

The court is respectfully requested to charge the jury as follows:

1st. That after a State has been admitted into the Union the control

of the United States Government over the Indians within the limits of the State cease, and they acquire the character of ordinary individuals domiciled within its limits, and are subject to the State laws, as other citizens and residents are.

2nd. That marriages within the State of Michigan, whether between white and white, or white and Indian, or Indian and Indian, domciled within the borders of the State of Michigan, are to be governed, construed, and controlled by the statute of Michigan, and the common law in force in said State.

3rd. That be the laws of the State of Michigan in force at the time the alleged marriage in this case is said to have occurred, all that
21 was requisite to a valid marriage between competent parties was, that the parties should mutually agree each with other to become husband and wife.

4th. That the statutes of Michigan in force at the date of the marriage alleged in this case, relating to marriage, are directory merely, and a marriage per verba de presenti followed by consum'ation, not solemnized by a minister of the gospel or justice of the peace of his county in the presence of two witnesses, will nevertheless be a valid marriage.

5th. That if the jury believe that the custom of the tribe to which Mowry's alleged wife belonged at the time of the marriage, in relation to marriage, was to marry for life, even though they find that the marriage might be arbitrarily terminated by either party, it nevertheless is such marriage as is recognized by the common law, and is valid.

6th. That in the community, such as this Indian community at Kewkawlin, if the jury find that the contract of marriage is for life, the mere fact that the power of separation might thereafter be arbitrarily exercised forms no part of the contract of marriage, and does not invalidate it.

22 7th. That where individuals domiciled within the State of Michigan declare marriage between themselves without an express reservation of the right to separate at pleasure, no custom will be permitted to be pleaded for the purpose of raising an implied right to separate.

8th. Marriage between an Indian and white domiciled within the limits of the State of Michigan, even though the jury may find an Indian custom permitting the parties to separate at pleasure, is voidable only, and will not bastardize the issue.

9th. If the jury believe, from all the evidence, that William Mowry and Mary, Pero's daughter, agreed to be husband and wife for life per verba de presenti, and that the daughter Elizabeth was born after the agreement, the marriage is valid in law and the child legitimate.

10th. That if the parties to said marriage agreed to take each other for husband and wife for life, that then the alleged custom granting the right of divorce at pleasure does not apply to the case, and such marriage is valid, even if the said custom is found to exist.

11th. That in an organized State of the Union, in the case of a marriage between a white man and an Indian woman, when the ques-
23 tion arises whether such marriage is valid under the laws of the State, the presumption is that the man intended to marry according to the laws of the State.

Ruling of the court upon the above points.

The within points are answered in the general charge so far as deemed necessary for the decision of the cause by the jury.

Dec. 21, 1874.

W. McKENNAN.

24 BERNARD L. MEISTER
vs.
ROBERT C. MOORE ET AL., F. S. BISSELL, et al.

No. 46. November term, 1873, and No. 45, May term, 1874. Ejectment.

Charge to the jury.

Both parties claim the property which is the subject of these suits under D'r Peter Mowry, and thence to W. A. Mowry, one of his sons. The plaintiff is the alienee of the alleged wife and daughter of W'm A. Mowry, and the defendants are his mother's vendees, M'r's Eliza Mowry, in whom the title of the property was vested, if he died unmarried and without issue.

It is obvious, then, that the fundamental question in the case is, whether the Indian woman alleged to have been Mowry's wife was united to him by a valid marriage, and this is to be determined by the laws of the State where the marriage-contract was made. So the plaintiff's counsel have requested me to instruct you in the second point submitted by them, and that point is accordingly affirmed.

The alleged marriage took place in the State of Michigan in the latter part of the year 1845. From 1833, when the present State of Michigan was a Territory, down to the present time, a statute on the relation of marriage has been in force, and during that period it has remained
25 without essential changes.

So far as we are advised—and we have had the benefit of the knowledge and researches of learned counsel from the State on both sides of these cases—there has not been any judicial construction of that statute or any determination of its effect upon the marriage contracts not made in conformity with its requirement. The only case touching it to which we have been referred decides that in so far as the age of consent is fixed by it the common law is abrogated. We are therefore left without the guidance of an authoritative exposition to ascertain its meaning and declare its effects upon the marriage in question.

The sixth section of the act authorizes the solemnization of marriages by justices of the peace within the counties for which they are resp'tively chosen, and by resident or ordained ministers of any denomination at any place within the State.

By the eight' section it is provided that "in the solemnization of marriages no particular form shall be required, except that the parties shall solemnly declare in the presence of the magistrate or minister and the attending witnesses that they take each other for man and wife. In every case there shall be at least two witnesses, besides the magistrate or minister, present at the ceremony."

The requirements of the section are imperitive and its meaning
26 clear. It is expressly applicable to every case of the solemnization of marriage, or, in other words, of the proposed creation of the marriage relation. No particular form is required to be observed in any case, but a magistrate or minister prescribed in the sixth section and two witnesses shall be present, and before them the parties shall solemnly declare their assent to the contract.

The co-existence of both conditions is imperatively prescribed, and the fulfillment of each is therefore indispensable to the lawful creation of the marriage relation.

This construction of the section is confirmed by subsequent sections of the act. Thus, the 14th section declares that "No marriages solemnized before any person professing to be a justice of the peace or a minister of the gospel shall be deemed or adjudged to be void, nor shall the

validity thereof be in any way effected, on account of any want of jurisdiction or authority in such supposed justice or minister, provided that the marriage be consummated with a full belief on the part of the persons marrying, or either of them, that they have been lawfully joined in marriage."

Does this not recognize the necessary presence of a minister or magistrate, invested with the jurisdiction defined in the sixth section of the act, at the solemnization of marriage, and declare in effect that only when it is solemnized in the presence of a person professing such
27 character and authority, under a full belief of the persons so married, or either of them, that the pretended magistrate or minister was really such, shall not be deemed or adjudged invalid? But if the false pretence was known before the nuptials or was discovered before the consummation of the marriage, is not the indication clear that the marriage shall be deemed or adjudged to be void? More certainly, then, would this result follow where the presence of either these functionaries was wilfully pretermitted. No less significant, in this connection, is the next section of the act, which is in these words: "The preceding provisions, so far as they relate to the manner of solemnizing marriages, shall not effect marriage among the people called Friends or Quakers, nor marriages among the people called Mennonists; but such marriages may be solemnized in the manner heretofore used and practiced in their respective societies."

Now, this section is certainly not to be assumed to be meaningless, or intended to have been ineffective. What reason can there be assigned for its insertion, if it be not upon the hypothesis that the eighth section, to which it plainly refers, prescribed essential conditions in the ceremonies of marriage which were exclusive of all different modes of solemnizing it?

It is well known that, among the Quakers, at least, there were no ordained ministers, and that in the solemnization of marriage among
28 them the agency of a minister or civil magistrate was not permitted. According to their practice, marriage was contracted by the declared acceptance by a man and woman of each other, as husband and wife, in the presence of witnesses. This comprehended all that the common law required to constitute marriage, but it did not embrace all that the eighth section of the act prescribed. Why, then, were these people relieved from observance of the requirements of this section, when they omitted but a single one—the presence of a minister or magistrate—if such an omission would not otherwise invalidate the contract?

Can there be any sufficient answer to this question, other than this, that the fulfillment of all the requirements of the section was essential to the validity of marriage, but as the observance of one of them was not practicable among Quakers, it was therefore necessary, to save the validity of their marriage, to exempt them from the operation of the section?

It is said, however, by some text-writers, whose opinions are entitled to respect, that statutes regulating marriage are not to be construed to avoid marriages contracted in violation of some of their provisions, unless the acts contained express words of nullity. Although there is high authority against this statement of the law, it certainly has the apparent support of a number of decisions by courts of great respectibility. But it should be predicated of what, in the sense of
29 the statute, may be treated as irregularities, and a non-observance of provisions simply directory, not of a disregard of conditions prescribed to be performed when the contract of marriage is made, and which constitutes essential elements of the mode of its solemnization.

The supreme court of Pennsylvania has gone beyond this, but not for the reason upon which the rule is stated to rest, declaring that the colonial acts of 1700 and 1729 had outlasted their adaptation to the habits and customs of society. They gave a constructive effect to a clause in those acts substantially like the 8th section of the Michigan statute, confessedly against its natural import, that they might thereby avert the extended social mischief which would result from its rigid execution. (Radebaugh 5 Sanks, 2 Watts, 11.)

But this court has no such dispensing power with regard to the Michigan statute. It is not so old that it has grown into disuse. It is a cherished feature of the policy of the State in reference to a subject which it has wisely undertaken to regulate. Whatever its true import is must be accepted by tribunals, at least, as its intended meaning, and effect must be given to it accordingly.

If the jury, therefore, find that neither a minister nor magistrate was present at the alleged marriage of William A. Mowry and the daughter of the Indian Perot—and such is the plaintiff's own proof—they are instructed that such marriage was invalid under the Michigan statute, and their verdict in such cases should be for the defendants.

WM McKENNAN, *Cir. Judge.*

BERNARD L. MEISTER *vs.* F. S. BISSELL ET AL. } No. 46. Nov'r term, 1873.

Verdict and motion for judgment.

December 21, 1874.—This case having been proceeded with from day to day, the evidence having been heard, the arguments upon the questions of law having been heard and considered, and the jury having heard the charge of the court, said: "We find for the defendants, and so we all say."

January 13, 1875.—Upon motion of defendant's attorney, judgment upon the verdict.

H. D. GAMBLE, *Clerk.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States, to the honorable the judges of the United States circuit court for the western district of Pennsylvania, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, between Bernard L. Meister, a citizen of the State of Michigan, and F. S. Bissell, Joseph Kaufman, Simon Kaufman, and Moses Oppenheimer, citizens of the State of Pennsylvania, a manifest error hath happened, to the great damage of the said plaintiff, as by his complaint appears: We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington City, on the 2d Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause

further to be done to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 15th day of January, A. D. 1875.

H. D. GAMBLE.

Allowed by

W. McKENNAN.

33 UNITED STATES OF AMERICA,
Western District of Pennsylvania, ss:

To F. S Bissell, Joseph Kaufman, Simon Kaufman, and Moses Oppenheimer, citizens of Penn'a, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, D. C., on the 2nd Monday of October next, pursuant to a writ of error filed in the clerk's office of the United States circuit court, wherein Bernard L. Meister, a citizen of the State of Michigan, plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness my hand this seventeenth day of July, A. D. 1875.

W. McKENNAN,
Judge of U. S. Circuit Court.

Service accepted July 23, 1875.

M. W. ACHESON,
Of Counsel pro Def'ts.

34 In the circuit court of the United States for the western district of Pennsylvania.

BERNARD L. MEISTER } No. 16. Nov'r term, 1873.
F. S. BISSELL ET AL. }

WESTERN DISTRICT OF PENNSYLVANIA, *ss:*

I, H. D. Gamble, clerk of the circuit court of the United States for the said district, do hereby certify that the annexed and foregoing pages contain a true copy of the record and proceedings in the above-entitled case, so full and entire as the same remains of record and on file in my office.

In testimony whereof I have hereunto signed my name and affixed the seal of the said court, at Pittsburgh, this seventh day of August, A. D. 1875.

[SEAL.] H. D. GAMBLE, *Clerk.*

WESTERN DISTRICT OF PENNSYLVANIA, *ss:*

I, William McKennan, judge of the United States circuit court for said district, do hereby certify that H. D. Gamble, above named, was, at the time of making the above certificate, and is now, clerk of the said court, and that the said certificate made by him is in due form of law.

W. McKENNAN,
U. S. Circuit Judge.

PITTSBURGH, *August 7th*, 1875.

35 *Plaintiff's bill of exceptions (both cases.)*

In the circuit court of the United States for the western district of Pennsylvania.

BERNARD L. MEISTER, A CITIZEN OF THE STATE of Michigan,
vs.
BISSEL ET AL., CITIZENS OF THE STATE OF Pennsylvania.

SAME PLAINTIFF
vs.
R. C. MOORE ET AL., CITIZENS OF THE STATE of Pennsylvania.

Be it remembered that on the second day of April, 1874, two actions of ejectment were brought in the circuit court of the United States in and for the western district of Pennsylvania, by Bernard L. Meister, a citizen of the State of Michigan, against the above-named defendants, to recover possession of those certain lots of ground situate in the city of Pittsburgh, county of Allegheny and State of Pen'sylvania, more particularly bounded and described in the plaintiff's declarations.

And be it also known that, upon due service of said writs, the said defendants appeared to said actions, and did, on the 8th day of April, 1874, by their counsel, file their pleas of not guilty.

And be it also known that on the 9th day of December, 1874, the parties in the case being at issue, a jury was called, empannelled, and sworn, whereupon the parties proceeded to offer evidence.

The plaintiff, to maintain the issue on his part, intr'duced evidence tending to prove that one William Mowry, now deceased, was
36 the owner in fee-simple of the land described in plaintiff's declaration, and that some time in the year 1852 he died intestate, leaving no issue living at the time of his death, except, as claimed by plaintiff, one child, a daughter named El'zabeth, who afterwards married a certain man named Isaacs, and subsequently, on the 27th day of August, 1873, the said Elizabeth, together with her said husband, conveyed the land in dispute to the said plaintiff.

And the said plaintiff, to further maintain the issue on his part intr'duced evidence tending to prove that the said William Mowby went from Pittsburgh, in the State of Pennsylvania, to the Saginaw Vall'y, in the State of Michigan, some time in the year 1844 or 1845; that he there became acquainted with an Indian girl named Mary, the daughter of an Indian called Pero, and plaintiff, in order to prove that a marriage had been consummated between the said William and Mary, called the following witnesses, who being duly sworn, among other things testified as follows, to wit:

MICHAEL DAILY.

Question. Where do you reside?

Answer. I live in Bay City, Michigan; formerly Lower Saginaw.

Q. What is your occupation?

A. I have been employed for the last year by the water board to supe'intend the laying of the water pipe, for the city.

Q. How long have you resided in Bay City, or that neighborhood?

A. I came into the Saginaw Vall'y in 1837.

Q. Have you resided there ever since?

37 A. Yes, sir.

Q. State, if any time there, you knew a man by the name of William Mowry?

A. I did, sir.

Q. When did you first become acquainted with him?

A. I first became acquainted with William Mowry in the fall of 1845.

Q. Was he there when you first went there, or did he come afterwards?

A. He came afterwards.

Q. About what time did he go there?

A. He may have came that year, as near as I can recollect.

Q. Did you know where he came from?

A. He told me he came from Pittsburgh.

Q. What was he doing there?

A. He was acting as clerk for M'r Baccus.

Q. State how you became acquainted with him, M'r Daily.

A. I became acquainted with William Mowry in the way that I was employed with M'r Baccus, when he worked for him.

Q. M'r Mowry, you say, was employed by M'r Baccus also?

A. I do not know whether he had a salary or not; he looked after his business; I do not know whether there was any wages or not.

Q. He was attending to his business?

A. Yes, sir.

Q. State whether Mowry was a married man when you first knew him.

A. He told me he was not.

Q. State whether you know he was married afterwards.

A. Yes, sir; I do.

38 Q. Tell the jury what you know about his marriage and all about it.

A. Well, as I stated before, I was employed by M'r Baccus in the store; M'r Baccus kept a store; our principal trade was with the Indians, because they were more numerous than the whites. The Indians used to come to the store to dispose of their furs and whatever they might have to dispose of at that time, and this woman, who afterwards became Mowry's wife, come to the store with the rest of them. I have seen her come to the store with the rest of them. M'r Mowry spoke to me several times about the girl; wanted me to use my influence in getting her; he wanted me to speak to her. I says to M'r Mowry, says I, I have no influence with that family; her father is a cross kind of a man and I would rather not say anything to the man about him. He says, to the man it won't make any difference; you speak to her. I says to him, says I, I would not like to do it. So I heard a conversation in regard to this matter between M'r Mowry and a man by the name of Ashman. It appears—what I picked up of the conversation (M'r Ashman stayed in the store overnight), M'r Mowry, Ashman, and myself stayed in the store——

Q. What did you hear Mowry say to Ashman?

A. I heard Ashman say to Mowry, says he to Mowry, I spoke to Pero, as you requested me, about this girl, but I can do nothing with him. There is some misunderstanding between you and him on a trading point, where the government used him bad. I can do nothing with him, but you get Pelke, a white man. This Ashman was a half-breed Indian. The man was married to an Indian woman and understood their cus-

toms and ways, spoke their language, and he say you get Pelke, I can do nothing with him. M'r Mowry did not know Pelke, he told
39 me. He wanted to know of me if I would not see Pelke for him. I told him I would. I saw this Pelke and told him M'r Mowry wanted to see him, so Pelke came to the store and Mowry told him what he wanted with him. This Pelke was married to this girl's aunt, a half-breed woman, lived in a settlement among them, and had a large family of children by this woman, and talked the Indian language some, and he wanted Pelke to intercede for him to get this woman.

Q. What did he say?

M'r A. Q. Did you see this?

A. Yes, sir. M'r Mowry says, I understand you are married to this girl's aunt, calling her by name. He told him that he wanted to get this girl for a wife, and told Pelke what he told me beforehand, that he intended to start a peddling stand and wanted to get this woman on account: she could help him collect furs. Pelke says to him, says he, Peroe is a cross man: I would not like to have anything to do with him. Mowry says to him, you can ask him, it won't make any difference to speak to him about it, and finally Pelke said to him he would, that if he was sincere in it he would speak to him, but he did not want to get into any trouble, as he was one of the family. Whether Pelke said anything about it I do not know, for he did not accomplish what Mowry wanted.

Q. M'r Daily, who was Pelke; in what family relation was he—a white man or an Indian?

A. Pelke was a white man: he was married to this girl's aunt, and had a large family of children, and lived in the settlement.

Q. You say you do not know whether Pelke interceded for him or not?

A. I do not know whether he did or not.

40 Q. Did you hear anything from Mowry about it?

A. The next man I recollect doing any business on the subject was a man by the name of Graveroade. Graveroade was a white man who always lived among the Indians; had an Indian woman for a wife; had a large family of children; understood their customs and ways, and talked their language well.

Q. What was his business?

A. He was an Indian trader.

Q. The next man you heard of in connection with the matter was Graveroade?

A. Yes, sir.

Q. What did you hear about it then, and from whom?

A. Graveroad was a white man who understood the Indian language, had an Indian woman for a wife, and had a large family of children. M'r Mowry told Graveroad he wanted him.

M'r A. Q. Were you present at this——

A. Yes, sir. I was in the store. M'r Mowry says to Graveroad, I understand you have a great deal of influence among the Indians. Graveroad said he had. I understand you have a great deal with the Peroe family. M'r Graveroad said he had known Peroe for a great many years and they never had any trouble. M'r Mowry told Graveroad that he wanted him to intercede for him to get this girl, calling by name. M'r Graveroad said that he would.

Q. Have you given us all of the conversation you can recollect that took place between Mowry and Graveroad?

A. No, sir.

Q. Go on.

A. M'r Graveroad said he would go on and do what he could
41 for him. Mowry said to Graveroad, I want you to go over to the settlement and fetch over Peroe, the father of this girl, and the mother and the girl.

Q. Did he do that.

A. Yes, sir; the girl did come, but Peroe and his wife come to the store.

Q. Was Mowry there when they came over?

A. Yes, sir.

Q. What took place between them there?

A. M'r Mowry, when he saw the girl was not there, he says to the father, speaking in Indian——

Q. Mowry spoke the girl's name in Indian?

A. He said to the father, "One-petis-misch?"

By the court:

Q. I understood you to say, in answer to M'r Acheson, that he did not speak Indian?

A. He spoke a little Indian, a very little.

Q. That was the girl's name in Indian?

A. Yes, sir.

Q. What reply was made?

A. The father said the girl was to home; what do you want with her? Mowry did not understand what he said exactly.

By the court:

Q. And he was told by the interpreter, Graveroad?

A. I will give you the words as near as I can what Peroe said to him; when he asked where his daughter was, Peroe said to him in Indian, "In-daw-wah-wat-on-a-dash."

Q. Which means in English, what?

A. It means she is at home; what do you want with her?

Q. That you say Mowry did not fully understand?

A. No, sir.

Q. (By M'r A.) Can you explain that?

42 A. No, sir.

Q. M'r Daily, what reply was made to that by Mowry or anybody?

A. Mowry says to the father, says he, I want to take her. Graveroad, you tell him I want to take her for my wife.

Q. He said to Graveroad?

A. Yes, sir, to tell the father.

Q. Did Graveroad do so?

A. Yes, sir.

Q. What did he say?

A. Graveroad talked with him—or the old man did not say anything, but the old woman. Peroe, as near as I can recollect, did not say anything.

Q. (By M'r A.) Tell us what Graveroad said to Peroe: did he speak in Indian?

A. Yes, sir.

Q. Tell us what he said to him.

A. I do not know that I can tell you what he did say.

Q. (By the court.) How did you understand it; did you understand what he said in Indian?

A. Yes, sir.

Q. Can you repeat it?

A. He said, pointing to Mowry, said he, "man-bau-ammy-top-anon-keno-dons."

Q. Now, M'r Daily, what does that mean; anything?

A. It means, "that man wants to get your daughter."

Q. You said this Peroe made no reply to that?

A. No, sir; he did not make no reply.

Q. What did she say?

43 A. She said that he was a white man.

Q. (By the court.) What did she say in Indian?

A. She said, pointing to Mowry, "man-bau-chin-omocan-cau-a-buts-se-ge-wa-in-ge-wa-ba-bonon-neno-adons."

Q. What does that mean; anything, M'r Daily?

A. It means, as near as I can recollect, "no, I don't want him to have my daughter, for he may stay with her for a while, and then go away and leave her; turn her away."

Q. After that reply was made, what was said?

A. Graveroad says to Mowry, offer them some presents.

Q. That was said in English, of course?

A. Yes, sir.

Q. Well, what did Mowry do?

A. Mowry gave them some presents, clothing, different articles, and some provisions. I put up the provisions myself. He requested me to put the provisions up, and I put them up.

Q. Were they accepted?

A. Yes, sir.

Q. Did Graveroad interpret to Mowry what Peroe had said?

A. Yes, sir.

Q. What did Mowry say in reply to that?

A. Mowry said that he did not intend to leave the countr', but intended to stay there.

Q. Is that all he said, M'r Daily?

A. He said he would take care of her as a wife.

Q. Was that reply interpreted to Peroe?

(Objected to.)

Q. What was then said?

44 A. Mowry said to Graveroad, says he, you tell her that I do not intend to go away, that I intend to stay in the country and take good care of her daughter, and use her well as a wife.

Q. Go on and tell what took place afterwards; just as it took place.

A. Have not I stated about Mowry making some presents to them?

Q. Yes, sir.

A. After they received the gifts they started to go away, the old man Peroe and his wife, and Graveroad was not going with them. William Mowry said to Graveroad, go with them, says he, Grave, and talk to them.

Q. Well, did Graveroad go with them?

A. Yes, sir.

Q. Did you see anything more about it, and when?

A. Yes; Graveroad went along with them and came back in the evening; he came back after we had locked up the store; M'r Mowry and myself was about ready to go to bed; and we used to lock up our store at night on account the Indians would bother a good deal, and when the rap came to the door I supposed it was an Indian, and M'r Graveroad hollowed to us, and I got up and unlocked the door and let them in; M'r Mowry and me commenced a conversation in regard to this girl, and Graveroad told me that the old folks was talking the matter up among themselves; things was going on well; Graveroad stayed in the

store all night; the next morning M'r Mowry sent over some presents to the girl.

Q. Whom did they send them by?

A. He sent them by Graveroad.

45 Q. What did he send?

A. Well, it was a long while ago. I don't know whether I can state what it was or not. It was some beds, some clothing, and some trinkets that we used to have in our store to traffic with the Indians. He done up the bundle and gave it to M'r Graveroad in the morning. The three of us had our breakfast together where we boar', and M'r Graveroad took the bundle and started for the settlement where they lived. He got back along in the afternoon—along in the—towards night, and told him the old folks had consented to let him have their daughter. M'r Mowry says to me, as he used to call me Mike and I used to call him Bill, says he, Mike, will you go with me? and I told him that I would.

Q. Did you go?

A. No, sir. I went away the next morning. This was in the evening he was speaking about it. The next morning I had to go away among the Indians a short way off when I promised to go to buy some furs, and I did not get back. It was some twenty miles away. I was gone longer than I expected. I was gone as near as I can recollect about three days.

Benjamin Pearce and Orin Kinny were also called and examined on part of the plaintiff, and testified to having had other and similar conversations with William Mowry about the same time.

46 Thaddeus Lamorandiere, James Cloud, sworn as interpreters.

MARY KAU-BA-YOH-WAH-GUOD sworn:

Q. Ask her what her name is.

A. Mary.

Q. Ask her where she resides.

A. Pinconing.

Q. Ask her how old she is.

A. Forty or more.

Q. Ask her if she ever knew a man by the name of William Mowry.

A. Yes.

Q. Ask her what her father's name was.

A. Peroe.

Q. Her mother's name.

A. Peedman.

Q. Ask her where they live.

A. Caucallin.

Q. Ask her where she first saw William Mowry.

A. At the store.

Q. Whose store?

A. Baccus'.

Q. Ask her where he was.

A. At-na-seo-ba-you, or Saginaw.

(By Cloud.) "She said at what they called Ninona—Saginaw."

47 Q. Ask her how many times she saw him at that store—if she can recollect.

A. About ten times, she says.

Q. Ask her how she came to go to that store.

A. To buy some things—meaning goods.
Q. Ask her what Mowry was doing there.
A. She says he was employed in the store.
Q. Ask her if she ever saw him at any other place than in the store.
A. Yes.
Q. Where?
A. On the other side—at the sugar bush.
Q. Ask her how long he stayed at the sugar bush.
A. Not very long.
Q. Ask her who, if any person, went to the sugar bush with him.
A. Yes.
Q. Ask her if she knows who it was.
A. Manback.
Q. Ask her whether it was a white man or an Indian.
A. An Indian.
Q. Ask her if he is living or dead.
A. No; not living.
Q. Ask her what she was doing there, she and her family.
A. She was making sugar.
Q. Ask her whether her people were there, and which of them.
A. Her father and mother, she says.
Q. Ask her where she next saw Mowry.
A. At the store.
48 Q. How long was that after he had been at the sugar bush?
A. She did not remember, she says.
Q. Ask her if she ever saw him at Caucallin.
A. Seen him.
Q. Whereabouts there?
A. At her father's house.
Q. Ask her to tell what he was doing there; what he said and did when he first came.
A. "I came for that purpose," what I have said before, and that they were sent to Peroe, her father.
(Cloud said,) "I came here for that purpose, what I said before."
Q. (To the interpreter.) Who was that said to?
A. To Peroe.
Q. Who said it?
A. Mowry.
Q. Ask her what reply did Mowry make.
A. She said her father said, "If you tell the truth, what you say now, I will let you go."
Q. What did Mowry say in reply, if anything?
A. Mowry said, "I tell the truth."
The answer is: Mowry said, "I tell the truth; I want to mar'y her."
Q. Ask her whether at that time Mowry or her father said anything to her about it.
A. I am satisfied if you will do that.
Q. Ask her whether she said anything.
A. Yes; she answered that she would marry William.
49 Q. Who did she make that answer to?
A. Her father.
Q. Was Mowry there when she made that answer?
A. Yes.
Q. Where did Mowry go after she said that?
A. He went back to his store.

Q. Ask her whether he spoke to her at that time; what he said before going back.

A. William Mowry said to her, "My wife."

Q. Ask her to tell what was said when Mowry was there.

A. Peroe said to her, "This is the one that is going to take care of you."

Q. Is that all?

A. Peroe said that would be satisfactory; what he wants to do.

Q. Ask her where William Mowry staid that night.

A. Slept with me.

Q. Where at—whose house?

A. At her father's.

Q. Ask her after that day what name she went by.

A. Mary Mowry.

Q. Ask her where she and Mowry lived after that.

A. Caucallin.

Q. In whose house?

A. Her father's.

Q. Ask him if William Mowry furnished the things for him and her at that house.

(Objected to; objection sustained.)

Q. Aks her who furnished the provisions and clothing for her
50 after that.

A. William Mowry furnished the clothing and provisions.

Q. Ask her who did the cooking for him.

A. She did.

Q. Ask her if she can mind of any clothing and provisions, and what kind they were.

A. Mowry gave her calico, clothing and blankets, and flour.

Q. Ask her whether or not the next day after she and William were married, she and William went any place together.

(Objected to.)

Q. (By the court.) The day after what she has stated occurred?

Q. Whether she and William Mowry went any place together?

A. Yes, she went with him just out of doors.

Q. Ask her where else than at her father's house they ever staid together.

A. She said, "No."

Q. Ask her if, after that, she ever was at Baccus' store with him.

A. She went with him to Baccus' store.

Q. Ask her whether they ever staid all night there.

A. Yes.

Q. Where did they sleep at the store?

A. In his bed.

Q. Together?

A. Yes.

Q. Ask her if she ever knew a missionary by the name of Brown.

A. She seen him.

Q. Where did she see him?

A. In Caucallin.

51 Q. At whose house?

A. She saw him several times at his house.

Q. Ask her whether she ever saw him at her father's house.

A. Yes.

Q. Ask her whether she ever saw him at her father's house when William Mowry was there?

A. He came there.
Q. Ask her who else was t'ere?
A. Her mother.
Q. Ask her to give the names of all the persons she knew was there.
A. Father and mother, sister and brother.
Q. Ask her what the missionary came there for?
A. To marry them.
Q. Ask her to tell what was said by the different persons who were
A. In the house, he said that the Indian marriage was just as good as the white man's marriage.
Cloud interpreted it: It is not necessary to do this, this way, because we have had it already.
The other interpreter said again: Our marriage was just as good; we already done that. It is just as good as your marriage.
M'r ACHESON. Q. Put the question this way, M'r Interpreter: Repeat what was said a little while ago.
Cloud replied: We done this. It is not necessary to do it again, "to marry again."
F. Q. Did you not say, M'r Cloud, it was not necessary to marry again?
52 A. Yes, sir.
F. Q. Who said that?
A. My father said that.
Q. Ask her whether Mowry said anything.
A. He said the same.
Q. Ask her whether she had any children at that time.
A. Yes, sir.
Q. How many?
Q. The question is: Whether at the time the missionary was there she had any children of her own.
A. One she said she had.
Q. The question is: Her own child?
A. Yes.
Cloud said: Did you say were there any children born at that time?
M'r A. You did not say born.
The interpreter said: She said yes; the child was born.
Cloud said: It was the same.
A. I want to know whether it was one child of more?
A. One she said; a child.
Q. Ask her if that shild is living.
A. Yes, the child is living.
Q. What is her name?
A. Elizabeth.
Q. Ask her whether Elizabeth was living at the time Brown was there wanting them to get married.
A. Yes, sir.
Q. Ask who was Elizabeth's father.
A. William Mowry.
53 Q. Ask her whether William Mowry ever gave her a picture of himself at any time.
A. He gave her a picture.
Q. Ask her where she kept that picture.
A. In her trunk. She would not keep it on the floor. She kept it in her trunk.
Q. Ask her if she ever gave that picture to any person.

A. She gave the picture to her daughter after she was big enough to take care of it.

Q. Ask her why she gave the picture to her daughter.

(Objected to.)

Q. Ask her if she told her daughter whose picture it was.

(Objected to. Objection sustained.)

Q. Show her that picture and ask her whose picture it is.

A. William Mowry's.

Q. Is that the picture William Mowry gave to her?

A. Yes.

Q. Ask her if William Mowry ever told her where he came from.

A. Yes; he said this way (pointing over her shoulder).

Q. Ask her if ever told her the name of the place.

A. Yes; but she could not recollect the name of the place.

Q. Ask her if he and she were living together; if he ever went home on a visit to Pittsburgh, or his own people.

A. Yes. He came back home.

Q. Ask her if he returned to Saginaw from that visit.

A. Yes.

Q. Ask her if he and she ever talked about buying any land to live together.

54 A. Yes; they talked about it.

Q. Ask her what he said about it.

A. Yes; I am going to buy some land; a piece of land.

Q. Ask her if he told her where he *he* was going to get the money to buy the land.

A. Yes; away (pointing this way, where he used to live).

Q. Ask her whether William Mowry is living or dead, if she knows.

A. He is dead.

Q. Ask her if she married again.

A. Yes.

Q. Ask her if it was after she heard of Mowry's death she married?

A. Quite a while after.

Q. Ask her if she knew where a man named Williams lived, at the mouth of the Caucallin River—Harvey Williams.

A. Yes; she knows the man.

Q. Ask her if she was ever there.

A. Yes.

Q. Ask her if she knew Peter Gillot.

A. She does know him.

Q. Ask her if she remembers Peter Gillot taking her and her sister in a skiff to Harvey Williams' house.

A. Yes.

Q. Ask her if she met a couple of white ladies there, strange white ladies, besides the man's *house* to whose house she went.

A. Yes, there was some women; strange.

Q. Ask her what they wanted to do.

(Objected to.)

55 We propose to show by this witness that these two white ladies wanted them to give her Elizabeth, that they might send her to Elizabeth's grandmother; offered her money for that purpose, to induce her to give up the child. We propose to offer testimony to show that these women were relations to William Mowry's mother, her grandmother.

(Objected to.)

Mr ACHESON. We do not know anything about this.

G. We propose to show by the witness that the two strange ladies were M'r's Burney and M'r's Addison Fitzhue, and the latter a legatee under Addison Mowry's will.

Cross-examination:

Q. Ask the witness how long it is since she first saw William Mowry.

A. She says she does not know exactly; over twenty years.

Q. Can she give us the year?

A. She can't.

Q. Can she give us the time when he came to her father's, and this conversation took place?

A. No; she never counted the years.

Q. Does she know her own age?

A. She says she could not tell.

Q. Ask her long after she first saw William Mowry he was at the house.

A. She could not tell how many years.

Q. Was her answer that she did not know how many years?

56 A. She could not tell.

Q. Did she use the word three?

A. Yes.

Q. The question is, how long from the time she first saw William Mowry she met him at her father's house, as she testified here.

A. She said from the time she first saw him—it was winter time—that is, the first time she ever saw him, in winter time—she said about in the fall time William Mowry came to their house.

Q. Was in the fall?

A. Yes; in the fall.

Q. Ask her whether it was the next fall.

A. No; it was not the next fall. It was the same fall.

Q. Can she tell how many months it was between the time she first saw him; how many months or years.

A. She could not tell the number of months.

Q. Who were present at her father's house when the conversation took place between Peroe and Mowry to which she testified?

A. My mother, two sisters, and my brother.

Q. Tell her to name her two sisters that were there.

A. One of them is named Rebecca, the other is Miriam.

Q. Ask her if they are living.

Q. Yes; they are living.

Q. Where are those sisters now living?

A. One of them lives at Kawkawlin, the other at Isabella.

Q. In what State?

A. Certainly; says to him, where you come from.

Q. Ask her how far Isabella is from Kawkawlin; how far apart.

A. She does not know what distance.

Q. Ask her her brother's name.

57 A. Shaw-wah-wah-quah-me.

Q. Ask her where her brother is now.

A. He is here. I do not see him just now.

Q. Ask her if Mowry and herself ever slept at Baccus' store more than one night.

A. Every time she came to the store. She always stopped there. She always stopped there because she could not get back the same day.

Q. Ask her how often she came to Baccus' store and remained all night.

A. She could not tell how often.

Q. Ask her if she testified that she had seen Mowry at Baccus' store about ten times.

A. Perhaps I seen him ten times.

Q. At Baccus' store?

A. At Baccus' store.

Q. Ask her if she continued to live at her father's house after the night when Mowry first slept with her.

A. Yes; she staid right at her father's house.

Q. Ask her if she can tell us when it was that Brown, the missionary, was at her father's house.

A. She could not tell.

Q. Cannot she tell how many years ago it was?

A. She could not answer that question.

Q. Ask her when Mowry was first at her father's house if he talked in English.

A. He understood the Indian language, she said.

Q. The question is, what language did he speak?

A. He was talking in the Indian language, and also in the English.

Q. Talked in both?

58 A. Talked in both.

Q. Ask her if she understood the English language at that time.

A. A little.

Q. Ask her what Bernard L. Meister has paid to or given her in money or clothes.

A. He gave a little provisions, and also these clothes that I have on now.

Q. Ask her what Meister has given her daughter.

A. He gave her clothes, the same as I have here, and a little provisions.

Q. Ask her if Meister has given either of them any money.

A. He gave her only three dollars.

Q. She says that Meister has given her three dollars. Now ask her if he has given her daughter any money. If so, how much?

A. She thinks about ten dollars. I did not see the money; neither she did not tell anything to me.

Q. Ask her how many times Louis Trombly has been to her to talk to her about this matter.

A. I asked her whether once, twice, or ten times, and she says she did not know; and I asked her whether six times. She says perhaps.

Q. Ask her if Michael Daily has been to see her about this suit.

A. I asked her this way, in our own language: Did you ever see Michael Daily anywhere? She says, Yes; once, at Meister's store. And I asked her again whether she ever talked about this suit. Now she said, Yes.

Q. Ask her if Trombly talked with her about this suit.

A. She says she does not understand about Mike Daily.

Q. The question is, whether she ever talked of this suit with Mike Daily.

59 A. Is the question, how often?

Q. Question—how often?

A. I talked with him several times about this property here now.

Q. Ask her whether Mike daily talked to her at Meister's store about this suit.

A. No, he did not say anything about it in the store.

Q. Ask her if Louis Trombly told her what to say about the property and about Mowry.

A. No.

Q. Ask her what her husband's name is.

A. Cub-ba-quit.

Q. Ask her whether she belongs to the Chippaway tribe of Indians.

A. Perhaps he is a Chippaway.

Q. She herself.

A. Perhaps I am.

Q. Ask her where she was married to her present husband.

A. Kawkawlin.

Q. When?

A. She does not know; perhaps over twenty years.

Q. Ask her the name of the clergyman or minister who married her.

(Objected to as assuming a fact not proved. Objection sustained.)

Q. Ask her the name of the clergyman who performed the ceremony when she was married to her husband.

A. A. Johnson.

R. D.—Q. Ask her if she belongs to M'r Johnson's church, or did at time she was married.

A. She did not know the name: she belonged to the church
60 with the big minister.

Q. She did not know his name.

A. Yes, sir: she did not know the name of the church she belonged to, but she belonged to the church where the big minister belonged.

Q. Ask her if she is a member of the church now.

A. Yes.

Q. What kind of a church? Ask her if she belongs to the Methodist church.

(Cloud answer.)

A. It may be Wesleyan or M. E. church.

T. Lamorandie says: She says "Methodist."

Q. Ask her if M'r Meister, besides the things he has given her when she signed the deed, agreed to give her anything else.

Q. Ask her if she is to get anything from M'r Meister if the property is got.

A. Yes, sir.

Q. Ask her how much.

A. She explained in this way: It is divided into four parts, and she gets one part.

Q. Ask her is to pay the costs of running the case.

Q. Meister.

Q. Ask her, when the missionary Brown was there at the time she speaks of, whether was in the room when the missionary came, or after the missionary.

A. William was there when Brown came in.

Q. Ask her if he had been there all that day.

A. William?

Q. Yes.

A. Yes.

61 Q. Ask her if she says now, besides those she has *has* named, who w're there.

A. She says, him, (pointing to Trombly.)

Q. What is his name?

A. Louis.

Q. What is his last name?
A. She does not know; she only knows Louis.
Q. That is at the missionary time.
A. Yes.
Q. Ask her if she belonged to the church at the time she married Mowry.
A. It was before she joined the church.
Q. Ask her if, before William came to her father's house first, she knew he was going to come, and what he was come for.
A. No; William did not say it.
Q. Ask her if anybody else said it to her.
A. No.
R. X.—Q. Ask her if one-fourth of the property is to go to her daughter and herself.
A. That is what I understand.
Q. One-fourth and herself?
A. Yes.
Q. Ask her whether she and daughter have any writing from Meister now.
A. Yes; they had.
Q. What became of it? Ask her if they have it now.
A. Louis Trombly has got it.
Q. Ask her when he got it.
62 A. Last winter.
Q. (By the court.) Who brought the missionary to her father's house—this man Brown?
A. Nobody; he came himself.
Q. Was he sent for?
A. No.
Q. How did come to propose to marry these people when neither the father nor Mowry denied it?
A. Brown oftentimes said to me that we might be married on account of this child; if we did not get it done, of course the shild would be poor.
Q. Did she express the wish to Brown that she should be married?
A. She never said anything to him.
Q. Who suggested to Brown that he propose to marry them or be married by him?
A. She said that Brown had said several times that they ought to be married, otherwise the child would be poor.
Q. But I want to know how it came about on this special occasion?
A. I do not know who done this. He came to us—that Brown came to us; I do not know who told this.
Q. Had she at any time expressed a wish to Brown that she would be married to him?
A. No.
Q. Did her father understand English?
A. Yes.
Q. Could he talk English?
A. Yes.
63 Q. Did he and Mowry speak together in English or Indian—Chippaway I mean at the time Mowry first came there?
A. The old man he was talking English, and Mowry he was talking his own language also, and sometimes he would put Indian words with it.
Q. That he spoke in Chippaway, and Mowry spoke in English, putting in Indian words?

A. Yes.
Q. Can she tell how old her daughter is—her daughter Elizabeth?
A. Twenty-four, she thinks.
Q. Had she any other living shildren by Mowry?
A. One dead.
Q. How long did it live?
A. She was not born.

John Fisher and William Ray were also called, sworn and examined on the part of the plaintiff, and who testified to having been present at the time of the alleged marriage, as testified to by Mary, and gave like evidence upon that subject.

64 The plaintiff, to further maintain the issue on his part, continued the examination of the said Michael Daily, and called and examined Benjamin Pearce, who severally testified (inter alia) as follows:

Michael Daily, continued:

When I returned to the store this woman was there with Mowry.
Q. What were they doing there?
A. I did not see the woman when I first went in. I laid down my pack and my hatchet, and I set down by the stove with my back to the bed-room; took off my moccasins and leggins; they were wet; put on my boots. Mowry came up to me and he says to me, "Mike, I want to make you acquainted with my wife." I was setting this way, and I turned around saw the young woman coming out of the bed-room where Mowry and me used to sleep.
Q. Do you know anything further about it?
A. I got up and shook hands with him, and he said, "I want to make you acquainted with my woman."
Q. (By M'r A.) He said "I want to make you acquainted with my woman"?
A. Yes, sir. I put out my hands and shook hands with her.
Q. Where did they stay that night?
A. They staid in the store.
Q. Where did they sleep?
A. They slept in Mowry's bed-room.
Q. Together?
A. 'Es, sir.

Q. When you shook hands with her, did you get up and shake
65 hands with her?

A. I shook hands with her.
Q. The bed-room you speak of was attached to the store, was it?
A. Yes, sir.
Q. Do you know how they remained at the store occupying that room?
A. I could not say; my business was generally among the woods; and they staid there that night, and the next day I packed up and started off again—I and Durwin—trading with the Indians. M'r Mowry, his wife, and myself went up to the place we used to board, and had breakfast together next morning.
Q. Do know of them living together after that?
A. Yes, sir, I do.
Q. Where did they live?
A. M'r Mowry used to have her sometimes at the store with him, and

other times she would be over at her father's, at a place called the Caucallan.

Q. What time did this take place, as near as you can tell?

A. In what year?

Q. Yes.

A. It was in the year 1845 or 1846.

Q. I am speaking in reference to the time Mowry was married to this woman?

A. This was after the time I got back.

Q. What year was it?

A. It was in 1845.

Q. What time in the year? Do you know?

A. It was the coming on of winter; about the last days of No-
66 vember, I think, or the first days of December.

Q. M'r Daily, I wish you would repeat, as exactly as you can recollect, the words Mowry used in introducing you to this Peroe's daughter in the evening you came back?

A. He touched me on the shoulder—I was sitting as I states before, taking off my moccasins—he touched me on the shoulder, and he said, "Mike, I want to make you acquainted with my wife," and I got out of the chair and put out my hand and shook hands with her. He either said it was his wife or woman; I won't be positive it was woman or wife.

Q. What sort of looking woman was she at that time?

A. She was a very good-looking woman.

Q. How did she compare with the other girls in the vicinity, white or Indian, at that time?

A. She was considered one of the finest-looking girls we had among us.

Q. Was she dark or fair?

A. She was not as dark as the Indian woman in general; rather light.

Q. How long did Mowry live with her altogether? Do you know?

A. I do not know as I could exactly; he lived there part of the time, and part of the time he would come home here to Pittsburgh. I could not tell exactly how long he lived with her exactly.

Q. Did they have any children?

A. Yes, sir.

Q. How many?

A. I don't know of any more than one.

Q. What was the child, a boy or girl?

A. A girl.

Q. Is she still alive?

67 Q. Is she still living?

A. Yes, sir.

Q. Are you acquainted with her?

A. Yes, sir.

Q. When did you first see the child?

A. I saw the child when I don't think the child was more than three weeks old. It was quite young.

Q. Who had it?

A. It was in Mowry's house, where he lived with his wife.

Q. Did you have any talk about the child?

A. I had heard from the Indians that there was a child, but I never had seen the child before, and I had business over that way, and I stopped at Mowry's house where he lived, and saw the child there.

Q. Did you ever see him and her together in the town, M'r Daily?

A. Who, sir?

Q. Mowry and his wife.

A. Yes, sir.

Q. Did you ever hear anybody there speak about them?

A. Yes, sir.

Q. How were they spoken of?

Q. M'r Daily, I wish you would look at that picture (picture her' shown witness) and state, if you can, whose it is.

A. William Mowry's.

Q. Is it a picture of the same William Mowry about whom you have been testifying?

A. Yes, sir.

Q. Now, M'r Daily, you have already testified that you saw Mowry and his wife at Baccus' store, and that you *and that you* saw them
68 at the house where they lived?

A. Yes, sir.

(The picture was here offered in evidence.)

Q. I wish you would now state to the jury at what times and places and under what circumstances you saw them, in any other place than the two places you have designated, together.

A. Yes, sir.

Q. Well, where was it that you saw them?

A. I have seen them at their house in Caucallin. I have seen them in Sag*g*inaw City together.

Q. Give the circumstances. Tell the jury what you saw and what took place when you saw them at Caucallin.

A. I went over to the house at Caucallin and saw M'r Mowry; had some business with him; saw him there, and, as I stated before, I had some business with him and called to the house. He asked me where I was going to. I was come there partly on business to see him, and on some business I had further on. I had to go down the river to see M'r Williams. He wanted me to stop and take dinner with him. It was pretty near noon. Said he, "Mike, hold on; stop and take dinner with me." I said I would do so. His wife cooked the dinner, and we had dinner together. I went down the river, and stopped when I came back. We shook hands and parted, and I came on to Lower Saginaw.

Q. Now, you say you saw them together at Saginaw City. What were they doing there?

A. Mowry was up there buying goods for his family.

Q. Were they in Saginaw?

A. They were in Colonel Little's store. He kept a store in
69 Saginaw City.

Q. What sort of goods was he buying?

A. His wife was picking the goods out. It was a good while ago. I don't think I can tell what it was exactly.

Q. Well, in a general way.

A. As near as I can recollect, it was clothing.

Q. Did he pay for them or not?

A. I did not see him pay for them.

Q. They were both there together?

A. Yes, sir.

Q. Any other place you saw them together? Any of which you can recollect of?

A. No, sir; I don't know whether I can recollect of seeing them together at Lower Saginaw—they called it then.

A. What were they doing in Bay City?

A. They were there together. He used to come over there with her

and get goods and things. I have seen him there buying goods for them, trading together, and buying some other things.

Q. Have you seen them on the street together?

A. Yes, sir.

Q. How did they behave towards each other in actions on the occasions on which you have seen them?

A. Well, I did not see no trouble between them.

Q. What was their conduct towards each other?

(Objected to. Objection sustained.)

Q. Mr Daily, have you detailed all the different places at which you saw them together? I wish to draw your attention to this. State whether you saw any other person at any time accompany them—in the company of both of them together.

A. I have seen at their house other parties there with them. I
70 have seen them at Lower Saginaw with other parties with them —some of her family along with them.

Q. Anybody else you ever saw with them besides her own family?

A. Yes, sir; I have Ben. Pierce and Mowry together. I recollect one time I saw them together and talking together.

Q. Who was Ben. Pierce?

A. He was a man who lived there in Saginaw.

Q. A white man or Indian?

A. A white man.

Q. Can you give us the names of any other white persons you ever saw with him?

A. I do not know as I recollect of any now.

Q. Was Ad. Mowry still ther' after this marriage—after these parties lived together?

A. Yes, sir.

Q. Did you ever see Ad. Mowry with them?

A. I did, at Saginaw City.

Q. When?

A. At this time I was speaking of him buying goods at Colonel Little's.

Q. The time you have already spoken of?

A. Yes, sir.

Q. You have told us already what they were doing at Col. Little's on that occasion. I wish you would give us the conversation, if any. Do you recollect of any talk between any of the parties at that time?

A. Between Mowry and myself or between Mowry and his brother?

Q. Between Mowry and his brother.

71 A. I do not know that I can recollect the words they spoke at that time. I don't know as I can recollect the conversation.

Q. Tell us what you can of it, if you recollect anything that was said there at that time?

A. I think I says to Mowry—I saw him there and shook hands together as generally friends will when they meet; I think I says to him, Bill, you are buying some goods here. We talked about other matters. It was a long time ago, and I don't recollect what I said.

Q. You do not know whether they were together or not?

A. No, sir; Ad. Mowry came into the store afterwards. I went into *to* the store, and Mr William Mowry was there, and I shook hands with him, and Ad. Mowry and his brother commenced talking together. What they said I do not know. Ad. went up and shook hands with Bill's wife. What the conversation was I could not tell you.

Q. Was she frequently at Baccus' store?

A. I have seen her there at different times.

Q. Did you ever see he' there when any other parties were about ?

A. Well, I don't know as I have seen her.

Q. Did you ever see or hear him introduce her to any person ?

A. No, sir.

Q. Do you recollect, M'r Daily, any person at any time making any presents to her; who was it and where; who made them; where and what were they ?

A. Well, I do not know as I do recollect any persons making any presents. I saw some stuff that a party told me——

(Objected to.)

A. I didn't see any presents made.

(Objected to.)

72 Q. M'r Daily, you were going to say you knew of somebody buying presents for this alleged wife of Mowry. When was that and who was that person ?

A. It was Addison Mowry.

Q. Now just tell the jury what occurred at that time ?

A. At the s'ore or at another time ?

Q. Either times. You stated that somebody told you about a present, but you did not see it delivered ?

A. Yes, sir.

Q. What did you see in relation to that matter ?

A. As near as I can recollect, I saw Mowry having some stuff that he was going to give to Bill's wife, but I did not see him give it.

Q. Ad. Mowry ?

A. Yes, sir.

Q. What did Addison say about it, if he said anything ?

A. He said he had a present for Bill's wife.

Q. Who did he say that to ?

A. He said that to me.

Q. Just tell us all that he said?

A. He said he had some stuff. I saw Ad. Mowry. This is another time him and William had been down here to Pittsburgh, and Ad. Mowry came along with him, I did not know he was in the place—M'r Fitzhue, William, and Addison. Fitzhue wanted me to go with him to see Bill's wife. He told me he had never seen her. I told him I would go with him. I got a span of horses from his cousin, William Fitzhue, who lived close by. We started to go down the Saginaw River. There was no road and we had to go by ice.

73 Q. Who was along this time?

A. As we got ready to go, Addison and Fitzhue, as I stated before, got ready to go over there. Addison Mowry came up and wanted to know where we were going: Fitzhue told him, my recollection is that we were going over to Bill's wife. Addison said that is just where I wanted to go, for Bill has sent up some goods and some money to his wife. He wanted to give it to her, and he said he had some presents himself to give to her. We started down the river to the place, and the team that we had was quite a heavy team. We generally used ponies for going on the ice those days, and going over the Cancallin River one of the horses broke in. I was driving, and M'r Fitzhue got scared and slid out. Giving a little jump, I ketched the horse and bro't him to shore. M'r Fitzhue, I said, I do not think it is adviseable to go up the river so I advised him to turn around and go back. M'r Mowry came around with us and we did not go over there, and M'r Mowry took the goods off and I did not see him make the present.

Q. How did he describe her in talking; what did he say?

A. Sometimes he would say Bill's wife, and other times Bill's woman, and other times Bill's squaw.

Q. At this particular time?

A. He said he had some stuff for Bill's wife.

Q. Now, M'r Daily, I wish you would try and recollect if you know anything about the Caucallin transaction?

A. I do not, sir, not to the best of my knowledge. I know nothing about it.

74 BENJAMIN PIERCE:

Q. Did see him at any time afterwards and have any conver-'ation with him upon the subject of his marriage?

A. It was almost daily or weekly or monthly time that I should occasional'y see him. It was almost a daily occur'ance of seeing William Mowry while trading there.

Q. What did he say, if anything, as to whether he was married or had got the girl?

A. He said he was perfectly satisfied with his wife.

Q. What did say, if anything, upon the subject of marrying her afterwards.

(Objected to the form of putting the question.)

Q. Will you state whether you ever saw him *him* and her together afterwards?

A. A great many times. I could not tell how many.

Q. Where did you see them together?

A. I saw them together in Saginaw City, in Bay City, called Lower Saginaw, then saw them together at Caucallin.

Q. Were you ever at his house where he lived?

Q. A. I have.

Q. Where did he live?

A. At Caucallin.

Q. In whose house?

A. M'r Peroe's. It was, I think, Peroe's house, with a little addition put into a part of it, that they occupied when I was there.

Q. What kind of a house was M'r Peroes'?

75 A. It was a loghouse; it might have been logs and boards.

Q. What part of it did Mowry occupy?

A. It was an addition that was placed on the back side of the house.

Q. Were you ever in his apartment?

A. I have.

Q. Who were there?

A. M'r Mowry and his wife and the child.

A. Q. You were there?

A. Was there.

W. Q. How did you come to be there, M'r Pierce; were you there on a visit or on business?

A. I was there on business.

Q. Tell us what took place when you were there at that time in reference to the child?

A. M'r Mowry brought the child and placed it into my arms. He said, is not that a nice girl.

Q. What further?

A. He made the remark—said he, if I live and have my health, I shall educate this as far as education shall go, and I shall make a lady of her that shall make some of the white ladies ashamed.

Q. Could you state, M'r Pierce, about what time that took place when you were there? I mean what year. What is your best recollection as to the year?

A. It was yearly for ten years right along then that I was on the shore. It was different times.

Q. What was the name of the child?

A. Elizabeth Mowry.

76 Q. Did he ever put the child in your arms, as you stated, more than once?

A. I don't recollect; I might have had it in my arms a dozen times or more, and at the times he was making this statement, that he was going to educate her.

Q. State whether you were present at any time when he intr'duced his wife to others.

A. I have been; a number *a* of times.

Hannah Raby, Leon Say, Marhta Rod, Louis Trombly, and others were examined by the plaintiff, and severally gave testimony relative to seeing William and Mary together at different times and places between the years 1846 and 1850. Once at camp-meeting, where they occupied the same tent, and twice or three times at public houses and other places, on some of which occasions they remained overnight and slept together; and to William makin' purchases of provisions and clothing for and intr'ducing the said Mary as his wife on several occasions, which testimony so given was similar to the testimony of the said Michael Daily and Benjamin Pierce as last above quoted.

77 The plaintiff, to further maintain the issue on his part, made the following offer in writing, to wit:

Plaintiff's offer.

A.

Plaintiff now proposes to prove by the witness Michael Daily that William Mowry and Mary (Peroe's daughter) lived and cohabited together, and that in the community in which they lived they were reputed and recognized to be man and wife.

Objection.

To which offer defendants' counsel objected in following words, to wit: Defendants' counsel object to the latter part of the above offer, to wit: "And that in the community in which they resided they were reputed and recognized to be man and wife." First, as incompetent and irrelevant generally. Second, that the witness has already testified that Mowry and the squaw were residing not in a white, but Indian community.

Judgment.

Whereupon the court sustained the objection, and rejected that portion of offer objected to.

Exception.

To which judgment of the court plaintiff's counsel did then and there except, and requested the court to seal a bill of exceptions, which is accordingly done.

W. M'KENNAN, [SEAL.]
Circuit Judge.

78 The plaintiff, to further maintain the issue on his part, having called Mary, the alleged wife of the said William Mowry, made the following offer:

Plaintiff's offer.

C.

Plaintiff's counsel propose to ask the witness whether or not at the time she gave William Mowry's picture to her daughter Elizabeth she told whose picture it was.

Objection.

To which offer the defendants' counsel did then and there object as being incompetent and irrelevant.

Judgment.

Whereupon the court did then and there sustain the objection and overrule the offer.

Exception.

To which judgment of the court plaintiff's counsel did then and there except, and request the court to seal a bill of exception, which is accordingly done.

W. M'KENNAN, [SEAL.]
Cir. Judge.

79 The plaintiff, to further maintain the issue on his part (having called and examined Mary, the alleged wife of the said William Mowry, who, inter alia, gave further testimony tending to prove that she knew one Harvey Williams, who resided at Kawkawlin, and that *about* at one time one Peter Jillet took her in a skiff to the said Harvey Williams', where she met two strange women), made the following offer in writing, to wit:

Plaintiff's offer.

D.

Plaintiff's counsel propose to follow the evidence now in, and show by the witness now on the stand and others, that the two strange ladies mentioned by the witness were M'r's Birney and M'r's Fitzhue, the latter being of kin to William Mowry and his mother; that they wanted the *the* witness to give her daughter Elizabeth Mowry to them to take away to her grandmother, and offered the witness money at the same time.

Objection.

To which offer defendants' counsel objected as being incompetent and irrelevant.

Judgment.

Whereupon the court did then and there sustain the objection and reject the offer.

Exception.

To which judgment the plaintiff's counsel then and there excepted, and requested the court to seal a bill of exception, which is accordingly done.

W. M'KENNAN, [SEAL.]
Cir. Judge.

80 The plaintiff, to further maintain the issue on his part (having called Alizabeth Isaacs, the daughter of the said William Mowry and his alleged wife, Mary, the Indian girl, who gave evidence tending to prove that her mother gave her a picture of her father, the said William Mowry, which she has kept to the present time, and is now produced in court), make the following offer, to wit:

Plaintiff's offer.

E.

Plaintiff's counsel now propose to prove by the witness, Elizabeth Isaacs, [that her mother gave her the picture shown, witness, when witness was a little girl, and before the present controversy arose,] and told witness that it was the picture of her father, William Mowry; that he was a white man, and was dead, and that her mother often talked to her about him.

Objection.

To which the defendants' counsel objected in following words, to wit: The defendants' counsel do not object to the witness stating that her mother gave her the picture when she was a little girl, but they do object to the residue of the offer as incompetent and irrelevant.

Judgment.

Whereupon the court sustained the objection in the following words, to wit: That part of the offer in brackets is already in evidence by the mouth of this witness, and without objection. The latter part of the offer, relating to the declarations of the witness' mother, is rejected.

Exception.

To which judgment of the court plaintiff's counsel did then and there except and request the court to seal a bill, which is done accordingly.

W. M'KENNAN, [SEAL.]
Cir. Judge.

81 The plaintiff, to further maintain the issue on his part, made the following offer in writing, to wit:

Plaintiff's offer.

E.

Plaintiff's counsel now propose to show by the witness, Elizabeth Isaacs, that her grandfather, Peroe, now dead, talked to her frequently about her father, and told her that he was a white man, and that his name was William Mowry.

Objection.

To which offer defendants' counsel did then and there object, as being incompetent and irrelevant.

Judgment.

Whereupon the court then and there sustained the objection and rejected the offer.

Exception.

To which judgment of the court the plaintiff's counsel did then and there except, and requested the court to seal a bill of exception, which is accordingly done.

W. M'KENNAN, [SEAL.]
Cir. Judge.

82 The defendants, to maintain the issue on their part (inter alia) offered the following evidence, to wit:

Defendant's offer.

No. 1.

The defendants' counsel offer in evidence the laws of the Territory of Michigan of 1833, and also the revised ststutes of the State of Michigan of 1838 and 1846, and the compiled laws of 1857 and 1871, containing the laws then in force of 1838 and 1846, for the purpose of showing the law regulating marriage, as the same has always prevailed in said Territory and State from 1833 to the present time, the volumes offered showing on their face that they have been published by the authority of the Territory and State of Michigan.

Objection.

To which offer plaintiff's counsel did then and there object, as follows: 1st. The Territory laws of Michigan are no longer in force, and have not been since the admission of Michigan as a State. 2nd. The statutes as offered are not properly authenticated. 3rd. The laws, except as they existed at the time of the alleged marriage, are irrelevant.

Judgment.

Whereupon the court overruled the objection and admitted the offer.

Exception.

To which judgment of the court the plaintiff's counsel did then and there except, and requested the court to seal a bill of exception, which is accordingly done.

W. M'KENNAN, [SEAL.]
Cir. Judge.

83 *Defendants' offer.*

No. 2.

The defendants' counsel propose to show by Dr James Robison, the witness on the stand, that he was very intimate with William Mowry, and that said Mowry spoke to the witness about the Indian woman, Miss Quawassum, during the time of his cohabitation with her as alleged by the plaintiff, and said Mowry spoke of said woman uniformly as his squaw, and never as his wife; that he spoke to the witness of his squaw he kept in Michigan, and told him that all the young white men at Saginaw kept squaws.

Objection.

To which offer the plaintiff's counsel did then and there object as being incompetent and irrelevant.

Judgment.

Whereupon the court did then and there overrule the said objection and admit the evidence.

Exception.

To which judgment of the court the plaintiff's counsel did then and there except, and request a bill of exceptions to be sealed, which is accordingly done.

W. M'KENNAN, [SEAL.]
Cir. Judge.

84 *Defendant's offer.*

Defendant's counsel make the following offer: The plaintiff's witnesses having testified to the declarations of William Mowry that he was married Indian fashion, or in the Indian way, the defendants propose to show by this and other witnesses that the customs among the Indians were at the time of Mowry's alleged marriage with Miss Quawaassum, in respect to commerce between the sexes, and that their so-called marriages were dissoluble at the will of either party, and further, that they were polygam'us, the husband having the privilege of taking as many wives as he pleased.

Objection.

To which offer the plaintiff's counsel did then and there object to that part of the offer which alleges that plaintiff's witnesses testified to the declarations by Mowry of marriage in Indian fashion, or in the Indian way, because it was no part of the plaintiff's testimony, but was brought out in cross-examination; and irrelevant generally—that the offer is incompetent and irrelevant.

Judgment.

Whereupon the court overruled the objection and admitted the evidence.

Exception.

To which judgment of the court the plaintiff's counsel did then and there except, and request the court to seal a bill of exceptions, which is accordingly done.

W. M'KENNAN, [SEAL.]
Cir. Judge.

85 *Defendants' offer.*

No. 4.

Defendants call William M. Darlinton, and propose to show by him that Schoolcrapt's "Information respecting the History, Condition, and Prospects of the Indian Tribes of the United States," collected and prepared under the direction of the Bureau of Indian Affairs, is high authority upon the subjects treated of in said work and universally recognized as such, both in the United States and in Europe; the same to be followed by an offer of volume second of said work title, "Constitution of the Indian Family," page 48, &c.

Objection.

To which offer counsel for plaintiff did then and there object, as being incompetent and irrelevant.

Judgment.

Whereupon the court overruled the objection and admitted the offer

Exception.

To which judgment of the court plaintiff's counsel did then and there except, and requested a bill of exception' to be sealed, which is accordingly done.

W. M'KENNAN, [SEAL.]
Cir. Judge.

86 *Defendants' offer.*

No. 5.

Defendants' counsel offer in evidence volume second, page 48, &c., title "Constitution of the Indian Family," of Schoolcrapt's "Information respecting the History, Condition, and Prospects of the Indian Tribes of the United States," collected and prepared under the Bureau of Indian Affairs, and published by authority of Congress, for the purpose of showing the temporary and polygamous character of the Indian marriages among the Chippaway and other northern tribes of Indians.

Objection.

To which offer plaintiff's counsel object, as being incompetent and irrelevant.

Judgment.

Whereupon the court overruled the objection and admitted the offer.

Exception.

To which judgment of the court the plaintiff's counsel except, and request the court to seal a bill of exceptions, which is done accordingly.

W. M'KENNAN, [SEAL.]
Cir. Judge.

87 Whereupon the plaintiff and defendanys, having closed their testimony, the said plaintiff, by his counsel, did urge and insist that 'he said plaintiff was entitled to have and maintain his action so as *as* aforesaid brought, and was entitled to recover possession of the land described in his declaration, and asked the court to charge the jury, inter alia, as follows, to wit:

3rd. That by the laws of the State of Michigan in force at the time the alleged marriage in this case is said to have occur'ed, all that was requisite to a valid marriage between competent parties was that the parties should mutually agree, each with the other, to become husband and wife.

Judgment.

Which said instruction the said court did then and there refuse in following words, to wit: "This point answered in the general charge, so far as deemed necessary to a decision of the cause by the jury."

Exception.

To which judgment of the court the plaintiff's counsel did then and there except, and request the court to seal a bill of exception, which is accordingly done.

W. M'KENNAN, [SEAL.]
Cir. Judge.

Whereupon the counsel for said plaintiff asked the said court to charge the jury further, as follows:

4th. That the statutes of Michigan in force at the date of the marriage in this case relating to marriage per verbia de pra'senti, followed by consummation, not sol'mnized by a minister of the gospel
88 or justice of the peace of his county, in the presence of two witnesses, will nevertheless be a valid marriage.

Judgment.

Which instruction the court did then and there refuse, in following words: "This point answered in the general charge, so far as deemed necessary to a decision of the cause by the jury."

Exception.

To which said judgment pla'ntiff's counsel did then and there except, and requested the court to seal a bill of exceptions, which is done accordingly.

W. M'KENNAN, [SEAL.]
Cir. Judge.

Whereupon the plaintiff's counsel asked the court to further charge the jury as follows, to wit:

5th. That if the jury believe the customs of the tribe to which Mowry's alleged wife belonged at the time of the marriage, in relation to marriage, was to marry for life, even though they find that the marriage might be arbitrarily terminated by either party, it nevertheless is such a marriage as is recognized by the common law, and is valid.

Judgment.

Which said instruction the said court did then and there refuse, in the following words, to wit: "This point answered in the general charge, so far as deemed necessary to a decision of the cause by the jury."

Exception.

89 To which said judgment of the court the plaintiff's counsel did then and there except, and requested the court to seal a bill of exception, which is done accordingly.

W. M'KENNAN, [SEAL.]
Cir. Judge.

Whereupon the plaintiff's counsel asked the court to charge the jury further, as follows, to wit:

6th. That in a community such as this Indian community at Kawkawlin was, that if the jury find that the contract of marriage is for life, the mere fact that the power of separation might thereafter be arbitrarily exercised forms no part of the contract of marriage, and does not invalidate it.

Judgment.

Which said instruction the court did then and there refuse, in the following words, to wit: This point answered in the general charge, so far as deemed necessary to a decision of the cause by the jury.

Exception.

To which judgment plaintiff's counsel did then and there except, and requested a bill of exceptions to be sealed, which is accordingly done.

W. M'KENNAN, [SEAL.]
Cir. Judge.

Whereupon the plaintiff's counsel asked the court to charge the jury further, as follows, to wit:

7th. That when individuals domiciled within the State of Michigan declare marriage between themselves without an express reservation of the right to separate at pleasure, no custom will be permitted to be pleaded for the purpose of rising an implied right to separate.

90 *Judgment.*

Which instruction the court refused in following words: This point answered in general charge, so far as deemed necessary to a decision of the cause by the jury.

Exception.

To which judgment plaintiff's counsel excepted, and at their request this bill of exception is sealed.

W. M'KENNAN, [SEAL.]
Cir. Judge.

Whereupon plaintiff's counsel asked the court to charge the jury further, as follows, to wit:

8th. That marriage, between Indian and white, domiciled within the limits of the State of Michigan, even though the jury may find an Indian custom permitting the parties to separate at pleasure, is voidable only, and will not bastardize the issue.

Judgment.

Which said instruction the court did then and there refuse, in following words, to wit: This point answered in general charge, so far as deemed necessary to a decision by the jury of the cause.

Exception.

To which judgment plaintiff's counsel did then and there except, and requested the court to seal a bill of exception, which is accordingly done.

W. M'KENNAN, [SEAL.]
Cir. Judge.

91 Whereupon plaintiff's counsel asked the court to instruct the jury further, as follows, to wit:

9th. If the jury believe from all the evidence that William Mowry and Mary (Peroe's daughter) agreed to be husband and wife for life, per verba de presenti, and that the daughter Elizabeth was born after the agreement, the marriage is valid in law and the child legitimate.

Judgment.

Which instruction the court then and there refused, in following words: This point answered in the general charge, so far as deemed necessary to a decision of the cause by the jury.

Exception.

To which judgment plaintiff's counsel did then and there except, and *and* requested the court to seal a bill of exception, which is accordingly done.

W. M'KENNAN, [SEAL.]
Cir. Judge.

Whereupon plaintiff's counsel asked the court to charge the jury further, as follows:

10th. That if the parties to said marriage agreed to take each other as husband and wife for life, that the alleged custom granting the right of divorce at pleasure does not apply to the case, and such marriage is valid even if said custom is found to exist.

Judgment.

Which instruction the court refused in following words: This point answered in the general charge so far as deemed necessary to a decision of the cause by the jury.

Exception.

To which judgment plaintiff's counsel did then and there except, and requested the court to seal a bill of exception, which is doné accordingly.

W. M'KENNAN, [SEAL.]
Cir. Judge.

92 Whereupon the plaintiff's counsel asked the court to charge the jury further, as follows, to wit:

11th. That in an organized State of the Union, in the case of marriage between a white man and an Indian woman, when the question arises whether such marriage is valid under the laws of the State, the presumption is that the man intended to marry according to the laws of the State.

Judgment.

Which instruction the court then and there refused, in following words, to wit: This point answered in the general, so far as deemed necessary to a decision of the cause by the jury.

Exception.

To which judgment plaintiff's counsel did then and there except, and requested the court to seal a bill of exception, which is accordingly done.

W. M'KENNAN, [SEAL]
Cir. Judge.

The court thereupon charged the jury as follows: (The parts of said charge excepted to are those parts embraced in brackets.)

Both parties claim the property which is the subject of these suits under D'r Peter Mowry, and thence to William A. Mowry, one of his sons. The plaintiff is the alience of the alleged wife, and daughter of William A. Mowry, and the defendants are his mother's vendees, M'r's Eliza Mowry, in whom the title of the property was vested, if he died unmarried and without issue.

93 It is obvious, then, that the fundamental question in the case is, whether the Indian woman alleged to have been Mowry's wife was united to him by a valid marriage, and this is to be determined by the laws of the State where the marriage contract was made; so the plaintiff's counsel have requested me to instruct you in the second point submitted by them, and that point is accordingly affirmed.

The alleged marriage took place in the State of Michigan, in the latter part of the year 1845. [From 1833, when the present State of Michigan was a Territory, down to the present time, a statute in relation to marriage has been in force, and during that period it has remained without essential change, so far as we are advised, and we have had the benefit of the knowledge and researches of learned counsel from that State on both sides of these cases, ther' has not been any judicial construction of that statute, or any determination of its effect upon the marriage-contract, not made in conformity with its requirement. The only case touching it to which we have been referred decides that in so far as the age or consent is fixed by it, the common law is abrogated. We are therefore left without the guidance of an authoritative exposition to ascertain its meaning, and declare its effect upon the marriage in question.

The sixth section of the act authorizes the solemnization of marriages by justices of the peace within the counties for which they are respectively chosen, and by resident or ordained ministers of any denomination at any place within the State.

By the eighth section it is provided that in the solemnization of marriages no particular form shall be required, except that the parties

94 shall solemnly declare in the presence of the minister or magistrate, and the attending witnesses, that they take each other for

husband and wife. In every case there shall be at least two witnesses, besides the majistrate or minister, present at the ceremony.

The requirements of the section are imperative, and its meaning clear. It is expressly applicable to every case of the solemnization of marriage; or, in other words, the proposed creation of the marriage relation. No particular form is required to be observed in any case, but a majistrate or minister, as prescribed in the sixth section, and two witnesses shall be present, and before them the parties shall solemnly declare their assent to the contract.

The co-existance of both conditions is imperatively prescribed, and the fulfilment of each is therefore indispensable to the lawful creation of the marriage relation.

This construction of the section is confirmed by subsequent sections of the act. Thus, the fourteenth section declares that no marriage solemnized before any person professing to be a justice of the peace, or a minister of the gospel, shall be deemed or adjudged to be void, nor shall the validity thereof be in any way affected, on account of any want of jurisdiction or authority in such supposed justice or minister, provided that the marriage be consummated with a full belief on the part of the person marrying, or either of them, that they have lawfully been joined in marriage.

Does this not recognize the necessary presence of a minister or majestrate invested with the jurisdiction defined in the sixth section of the act, at the solemnization of the marriage, and declare in effect that only when it is solemnized in the presence of a person professing such character and authority, under a full belief of the persons so married,
95 or either of them, that the pretended majestrate or minister was really such, shall not be deemed or adjudged invalid? But if the false pretense was known before the naptials, or was discovered before the consummation of the marriage, is not the indication clear that the marriage shall be deemed or adjudged to be void?

More certainly, then, would this result follow when the presence of either of these functionaries is willfully pretermitted.

No less significant in this connection is the next section of the act, which is in these words: "The preceding prosections so far as they relate to the manner of solemnizing marriages shall not affect marriage among the people called Friends or Quakers, nor marriages among the people called Mennonists, but such marriages may be solemnized in the manner heretofore used and practiced in their respective societies."

Now this section is certainly not to be assumed to be meaningless, or intended to have been ineffective. What reason, then, can be assigned for its insertion, if it be not upon the hypothesis that the eighth section, to which it plainly refers, prescribed essential conditions in the ceremonies of marriage, which were exclusive of all different modes of solemnizing it?

It is well known that among the Quakers at least, there were no ordained ministers, and that in the solemnization of marriage among them the agency of a minister or civil majestrate was not permitted. According to their practice marriage was contracted by the declared acceptance by a man and woman of each other as husband and wife in the presence of witnesses. This comprehended all that the common law
required to constitute marriage, but it did not embrace all that
96 the eighth section of the act prescribes. Why, then, were these people relieved from the observance and requirements of this section, when they omitted but a single one—the presence of a minister or

majistrate—if such an omission would not otherwise invalidate the contract.

Can there be any sufficient answer to this question other than this, that the fulfilment of all the requirements of the section was essential to the validity of marriage, but as the observance of one of them was not practicable among the Quakers, it was therefore necessary, to save the validity of their marriage, to exempt them from the operation of the section?

It is said, however, by some text-writers, whose opinions are entitled to respect, that statutes regulating marriages are not to be construed to avoid marriages contracted in violation of some of their provisions, unless the acts contained express words of nul'ity. Although there is high authority against this statement of the law, it certainly has the apparent support of a number of decisions by courts of great respectability, (but it should be predicated of what in the sense of the statute may be treated as irregularities and of a non-observance of provisions simply directory, not of a disregard of conditions pre'cribed to be performed when the contract of marriage is made, and which constitutes essential elements of the mode of its solemnization.)

The supreme court of Pennsylvania has gone beyond this, but not for the reason upon which the rule is stated to rests, declaring that the colonial acts of 1700 and 1729 had outlasted their adaptation to the habits and customs of society. They gave a constructive effect to a clause in those acts substantially like the eighth section of the Mic'igan
97 statute, confessedly against its natural import, that they might thereby avert the extended social mischief which would result from its rigid execution. (Radebaugh vs. Sanks, 2 Watts, 11.)

[But this court has no such dispensing power with regard to the Michigan statute. It is not so old that it has grown into disuse. It is a cherished feature of the policy of the State in reference to a subject which it has wisely undertaken to regulate. Whatever its true import is must be accepted by other tribunals, at least, as its intended meaning; and effect must be given to it accordingly.

If the jury, therefore, find that neither a minister nor a majistrate was present at the alleged marriage of William A. Mowry and the daughter of the Indian Peroe, and such is the plaintiff's own proof, they are instructed that such marriage was invalid under the Michigan statute, and their verdict in such case should be for the defendants.]

Exception.

To those parts of said charge embraced in brackets, the plaintiff's counsel did then and there except, and requested the court to seal a bill of exceptions, which is accordingly done.

W. McKENNAN, [SEAL.]
Cir. Judge.

SEPTEMBER 9, 1876.

98 In the circuit court of the United States for the western district of Pennsylvania.

MEISTER *vs.* BISSELL ET AL. } No. 46. November term, 1873.

MEISTER *vs.* MOORE ET AL. } No. 45. May term, 1874. Ejectment.

Whereas a certified copy of the record of these cases was filed in the Supreme Court of the United States before this bill of exceptions was filed in the circuit court, it is therefore agreed that the same, or a certified copy thereof, may be filed with and made part of the record now on file in the Supreme Court, to have same effect, to all intents and purposes, as though it had been originally filed with the record in Supreme Court.

September 14, 1876.

M. W. ACHESON,
JOSEPH S. MORRISON,
Att's for Def'ts in Error.
WEIR & GIBSON,
Att's for Pl'ff in Error.

99 In the circuit court of the United States for the western district of Pennsylvania.

MEISTER *vs.* MOORE ET AL. } No. 46. Nov'r term, 1873.

MEISTER *vs.* BISSELL ET AL. } No. 45. May term, 1874.

WESTERN DISTRICT OF PENNSYLVANIA, *ss:*

I, H. D. Gamble, clerk of the circuit court of the United States for the said district, do hereby certify that the annexed and foregoing pages contain a true copy of the bill of exceptions filed & agreement in the above-entitled cases, so full and entire as the same remains of record and on file in my office.

In testimony whereof I have hereunto signed my name and affixed the seal of the said court, at Pittsburgh, this 3rd day of October, A. D. 1876.

[SEAL.] H. D. GAMBLE, *Clerk.*

WESTERN DISTRICT OF PENNSYLVANIA, *ss:*

I, William McKennan, judge of the United States circuit court for said district, do hereby certify that H. D. Gamble, above named, was, at the time of making the above certificate, and is now, clerk of the said court, and that the said certificate made by him is in due form of law.

W. McKENNAN,
U. S. Circuit Judge.

PITTSBURGH, *Oct. 3rd*, 1876.

(Indorsement on cover:) No. 261. Bernard L. Meister, plaintiff in error, vs. F. S. Bissell, Joseph Kaufman, Simon Kaufman, and Moses Oppenheimer. W. Pennsylvania C. C. U. S. Filed 20th October, 1875.

SUPREME COURT

OF THE

UNITED STATES.

No. 260.

BERNARD L. MEISTER,
Plaintiff in error,
vs.
ROBERT C. MOORÉ, et al,
Defendants in error.

No. 261.

BERNARD L. MEISTER,
Plaintiff in error.
vs.
F. S. BESSELL, et al.
Defendants in error.

BRIEF FOR PLAINTIFF IN ERROR.

Statement of the Case and Questions Raised.

Bernard L. Meister brought actions of ejectment in the circuit court of the United States for the western district of Pennsylvania to recover certain real estate situate in and adjoining the city of Pittsburgh.

The defendants in each case appeared and entered a plea of not guilty.

The two cases were tried, as one action, before a jury, and on the trial the plaintiff to maintain the issue on his part, introduced evidence tending to prove that William Mowry went from Pittsburgh in the state of Pennsylvania to the Saginaw valley, in the state of Michigan, sometime in the year 1844 or

1845; that he there became acquainted with an Indian girl named Mary, the daughter of an Indian named Pero; that in the fall or early winter of 1845 William Mowry and Pero's daughter Mary were married; that they lived and cohabited together thereafter as husband and wife, and had one child born to them, named Elisabeth, who is still living; that William Mowry during his lifetime was the owner in fee simple of the lands described in the plaintiff's declaration; that he died intestate, sometime in 1852, leaving no issue living at the time of his death, except his said daughter Elisabeth, who afterwards married a certain man named Isaacs, and that on the 27th day of August, 1873, the said Elizabeth Isaacs, together with her husband, conveyed the land in dispute to the plaintiff.

The questions involved upon the trial all grew out of and related to the fact and validity of the marriage between William Mowry and Mary, the daughter of Pero.

While it was insisted on the part of the plaintiff that the parties were married in 1845, as stated, yet it was not claimed that a marriage was solemnized in accordance with the provisions of the statute of Michigan then in force, viz.: in the presence of a magistrate or minister, but

First, that the parties, in presence of witnesses, agreed presently, to take each other for husband and wife, and from that time lived and cohabited together in that relation; and that such, then and ever since, constituted a valid marriage in Michigan, the statutes of that state not declaring such a marriage void, and

Secondly, Admiting such an agreement to have been invalid, and that the plaintiff was unable to

prove a marriage, solemnized by a minister or magistrate after that time, yet evidence was introduced of their living and cohabiting together as husband and wife; of their treating each other on all occasions as such, and other circumstances which it was claimed should have been submitted, under proper instructions, to the jury, and from which they might have found that a subsequent valid marriage had taken place.

Upon this theory of the case, and also as having an important bearing upon the first proposition, plaintiff made certain offers to prove, which were excluded. Amongst others:

That in the community in which William and his wife resided, they were reputed and recognized as husband and wife; also:

Of certain conversations between William's daughter Elisabeth, and her mother and grandfather relating to her father, William Mowry.

ASSIGNMENTS OF ERROR.

I.

The court erred in not permitting counsel for plaintiff to prove, "That in the community in which they (William Mowry and Mary) lived they were reputed and recognized to be man and wife." (Plaintiff's offer, A. Record pp. 34.)

II.

The court erred in not permitting plaintiff's counsel to ask Mary, wife of the said William Mowry, "whether or not at the time she gave William Mowry's picture to her daughter Elisabeth she told her whose picture it was." (Offer C, pp. 35).

III.

The court erred in not permitting plaintiff's counsel to prove, "that the two strange ladies mentioned by the witness (William's wife) were Mrs. Birney and Mrs. Fitzhugh, the latter being of kin to William Mowry and his mother, that they wanted the witness to give her daughter Elisabeth Mowry to them to take away to her grandmother, and offered the witness money at the same time." (Offer D. pp. 35).

IV.

The court erred in not permitting plaintiff's counsel to prove by Elisabeth that at the time her mother gave her the picture, she "told witness it was the picture of her father, William Mowry; that he was a white man, and was dead, and that her mother often talked to her about him." (Offer E. pp. 36).

V.

The court erred in not permitting plaintiff's counsel "to show by the witness Elisabeth Isaacs that her grandfather, Pero, now dead, talked to her frequently about her father, and told her that he was a white man, and that his name was William Mowry." (Offer F. pp. 36).

VI.

The court erred, in severally refusing to instruct the jury as requested by counsel for plaintiff in their third, fourth, fifth, sixth, seventh, eighth, ninth and tenth requests to charge, viz:

3d. That by the laws of the state of Michigan in force at the time the alleged marriage in this case is said to have occurred, all that was requisite to a valid marriage between competent parties, was that the parties should mutually agree, each with the other, to become husband and wife." (pp. 40).

4th. "That the statutes of Michigan in force at the date of the marriage in this case, relating to marriage *per verba de praesenti*, followed by cohabitation, not solemnized by a minister of the gospel or justice of the peace of his county, in the presence of two witnesses, will nevertheless be a valid marriage." (pp. 40).

5th. "That if the jury believe the customs of the tribe to which Mowry's alleged wife belonged at the time of the marriage, in relation to marriage, was

to marry for life, even though they find that the marriage might be arbitrarily terminated by either party, it nevertheless is such a marriage as is recognized by the common law and is valid." (pp. 40).

6th. "That in a community such as the Indian community at Kawkawlin was, that if the jury find the contract of marriage is for life, the mere fact that the power of separation might thereafter be arbitrarily exercised, forms no part of the contract of marriage, and does not invalidate it." (pp. 41).

7th. "That when individuals domiciled within the state of Michigan, declare marriage between themselves, without an express reservation of the right to separate at pleasure, no custom will be permitted to be pleaded, for the purpose of raising an implied right to separate." (pp. 41).

8th. "That marriage between Indian and white, domiciled within the limits of the state of Michigan, even though the jury may find an Indian custom permitting the parties to separate at pleasure, is voidable only, and will not bastardise the issue." (pp. 41).

9th. "If the jury believes from all the evidence that William Mowry and Mary (Pero's daughter) agreed to be husband and wife for life *per verba de præsenti*, and that the daughter Elisabeth was born after the agreement, the marriage is valid in law and the child legitimate." (pp. 42).

10th. "That if the parties to said marriage agreed to take each other as husband and wife for life, that the alleged custom granting the right of divorce at pleasure does not apply to the case, and such mar-

riage is valid, even if said custom is found to exist." (pp. 43).

11th. "That in an organized state of the Union, in the case of marriage between a white man and an Indian woman, when the question arises whether such marriage is valid under the laws of the state, the presumption is that the man intended to marry according to the laws of the state." (pp. 43).

VII.

The court erred in charging the jury as follows: "If the jury therefore find, that neither a minister nor a magistrate was present at the alleged marriage of William A. Mowry and the daughter of the Indian Pero, and such is the plaintiff's own proof, they are instructed that such marriage was invalid under the Michigan statute, and their verdict in such case should be for the defendants." (Record pp. 45).

POINTS OF LAW.

The several errors assigned raise the following legal questions:

First. In a civil case, where the right to property is to be made out by proof of a marriage, is evidence admissable to prove, that in the community

in which the parties resided they were reputed and recognized to be husband and wife?

Second. Are declarations of deceased relatives admissable in cases of pedigree?

Third. Where parties capable in law of contracting a valid marriage, agree presently to take each other for husband and wife, and from that time henceforth live professedly in that relation, will evidence of such facts, in a civil case, be sufficient proof of a valid marriage, where the evidence affirmatively shows that the statutory regulations of the state, requiring marriages to be solemnized in the presence of a minister or magistrate have not been complied with?

Fourth. In a case where it affirmatively appears that such a relation was attempted to be entered into, but not in the presence of a magistrate or a minister, may proof of such agreement, and that the parties lived and cohabited together as husband and wife, treating each other as such on all occasions when together thereafter; that they were admitted into and recognized in respectable society, and in public as such, be submitted to the jury, as competent evidence tending to prove a valid legal marriage?

Fifth. In a case where competent evidence has been introduced tending to show that a valid, binding marriage was entered into between a white man and an Indian girl, will evidence tending to prove a custom existing in the Indian tribe to which the girl belonged, that their marriage was dissoluble at the will of either party, and that polygamy was prac-

ticed among the tribe, be admissable to prove such valid marriage illegal and bastardise the issue?

These propositions we will discuss in their order, but shall not again repeat them at length.

I.

Was it competent to show that in the community where the parties resided, they were reputed and recognized to be husband and wife?

That such proof alone would be insufficient to establish a marriage we may be willing to admit. Such evidence is, however, always held admissable, and when supported by other facts, such as cohabitation etc., will be sufficient.

What weight should be given to such testimony, or its sufficiency in connection with the other facts proven, is not the question, but whether such evidence is admissable at all?

It was not seriously contended, in the court below, that such evidence was inadmissable, but that evidence of general reputation must be confined to the reputation *amongst Mowry's relations*; and the farther reason as appears by the record that the parties "were residing not in a white but in an Indian community."

The first objection is clearly untenable. To hold such to be the law would be to deprive all foreigners, residing, and who claimed to be married in this country, from proving their marriage by reputation. Having no relatives here, they could not show a reputation or recognition amongst relatives.

The same would be equally true of parties removing from one state to another; and many illus-

trations might be given showing the absurdity of such a limitation upon the rule.

Such is not the foundation upon which the rule rests. The reason upon which the rule is founded rests upon the principle, that parties will not be received into society, or visited by respectable families, as husband and wife, unless their conduct, reputation and demeanor induce the opinion and belief generally, that their relation towards each other are as claimed.

Where parties are living together in a well-known illicit relation, such fact is generally well-known, especially so in a new country, and they are recognized and treated accordingly.

The second objection made is true neither in fact nor in law:

They were not residing in an Indian community; that many white families resided in the Saginaw country at that date the evidence clearly showed, and it just as clearly appeared that these first settlers were respectable, and that Mowry and wife were admitted to their houses and were visited by them and treated on all occasions as husband and wife.

A number of witnesses, all white, testified that William and Mary lived and cohabited together as husband and wife from the time of their marriage until 1850. They went to camp-meeting and occupied publicly the same tent; they went to hotels and public places together; whenever they remained over night at a place they invariably occupied the same room; William made purchases of provisions and clothing; he introduced Mary as his wife; she was recognized by William's brother, Addison, and by

others of his relatives as his wife. Indeed, it is impossible to read, even the meagre portion of the testimony appearing in the record, and say that it does not tend to prove a valid marriage; or, that because Indians resided in or near the same community, such evidence of reputation or recognition was inadmissable.

Recognize, however, for a moment the distinction claimed in this case, viz.: that in a new country, where the Indians predominate, such evidence of reputation is inadmissable and what is the result; where shall the line of demarkation be drawn?

In Washington, reputation and recognition in the higher walks of life is considered sufficient. Indeed, in most cases reputation is the only evidence the parties upon either side seek for or rely upon.

There are, however, many people residing in Washington claiming to be husband and wife, who are not admitted in, or recognized by the first families: does it follow that in such cases the relation claimed does not therefore exist?

Or again, must we confine such evidence of reputation to the cities and thickly settled portions of the community?

True, in the higher walks of life and in thickly settled communities there may be less chance for deceit, or a false reputation, but all that goes only to the weight and not to the admissability of the testimony.

It is the recognition by and reputation in *the community where the parties reside, and in the society to which they belong*, that determines this question; nothing beyond this is or can be required.

II.

Declarations of deceased relatives have always been held admissable in cases of pedigree. (1 Greenleaf's Ev. § 103, et seq).

The statement made be Mrs. Mowry when she gave to her daughter her father's picture, was clearly admissable. It characterized and gave force and effect to an act which otherwise would have been of but little weight.

The third and fourth propositions may be considered together:

III & IV.

Should the evidence introduced in this case have been submitted to the jury, from which they might have found a marriage; or,

In other words, was it incumbent on the plaintiff to prove that a marriage had been entered into between the parties, in presence of a magistrate or minister as required by the statutes of Michigan then and now in force?

I think it may now safely be laid down, as a legal proposition, supported by an overwhelming weight of authority, "that all regulations concerning the forms of marriage, whether made by ecclesiastical councils or by legislative act, are directly only; not affecting the validity of a marriage had in disregard of them, *unless they contain an express clause of nullity.*" (1 Bishop M. & D., § 277 a). It will not

be pretended that the Michigan statutes ever contained such a clause.

It would be a waste of time to attempt a review of the authorities of the different states upon this subject. A reference to Bishop on Marriage and Divorce will be sufficient. (See § 279, 5th edition; see also §§ 280, 283, et seq). I refer to a late leading case, which very fully discusses the question, decided in April, 1877, by the supreme court of Minnesota; reported in Chicago Legal News of June 16, 1877. (The State vs. Worthington).

See also a late case in Kentucky. (Commonwealth vs. Jackson. 11 Bush. 679.)

Supreme Court of Michigan—Its Views.

We submit, however, that the Supreme Court of Michigan has disposed of this question, and that the decision of that court upon the construction of a statute should be adhered to and followed by this court. Such of course is the general rule, but in this class of cases a far greater reason exists for following and adopting the views of the state court.

In *Hutchins vs. Kimmell*, 31 *Mich.* 126, it became necessary for the Supreme Court of the state of Michigan to consider the validity of a marriage entered into in a foreign country, where it was insisted that proof of the ceremony alone was not proof of the marriage until the law was shown that would make it such. This case had been argued and submitted to the Supreme Court of Michigan at the time the cases at bar were tried; but the fact of the pendency of such a case in the Michigan court, was

unknown to any of the counsel in this case until after the trial below.

The reasons given in the opinion of the Court proceed upon the doctrine, that a "marriage between parties capable of contracting it, is of common right, and valid by a common law prevailing throughout Christendom." That regulations restrictive of this right are exceptional, dependent on local statutes, and must be established by the party claiming that the case comes within and is governed by such exceptions. That it has been held, that the common law as it exists in Michigan will be presumed to prevail in a foreign country, in the absence of proof to the contrary. It therefore became necessary in the case to determine whether a common law marriage would be good in Michigan, notwithstanding the statute of that state.

The Court said: "It is not disputed that in a case of this nature, (an action for criminal conversation) an actual marriage must be proved. Such evidence of cohabitation and reputation as would be sufficient in other civil actions, will not suffice where it is is sought to fix upon the woman a charge of adultery (citing authorities). *But had the supposed marriage taken place in this state*, evidence that a ceremony was performed ostensibly in celebration of it, with the apparent consent and co-operation of the parties, *would have been evidence of a marriage, even though it had fallen short of showing that the statutory regulations had been complied with*, OR HAD AFFIRMATIVELY SHOWN THAT THEY WERE NOT.

Whatever the form of the ceremony, *or even if all ceremony was dispensed with*, if the parties agreed presently to take each other for husband and wife, and from that time lived together professedly in that

relation, proof of these facts would be sufficient to prove a marriage binding the parties, and which would subject them and others to legal penalties for a disregard of its obligations. This has become the settled doctrine of the American courts; the few cases of dissent, or apparent dissent, being borne down by a great weight of authority in favor of the rule as we have stated it." (Citing a large number of authorities).

The Court then adds: "*Such being the law of this state*, it remains to be seen whether the rule can be applied to a marriage contracted in a foreign country, in the absence of any evidence showing what is the law on the subject of marriage in such foreign country."

The question as to whether a certain marriage was proven by legal evidence, came up in two cases at tke January term of the Michigan Supreme Court in 1878.

The facts sufficiently appear in that part of the opinion delivered by Campbell, Ch. J., which we here quote, the opinion not yet being reported.

SAMUEL PROCTOR, vs. NANCY BIGELOW. / WILLIAM H. SCOTT, vs. NANCY BIGELOW.

Campbell, Chief Justice.

"Nancy Bigelow sued for dower in lands aliened by her husband in 1838. He died in 1851. These suits were brought in 1876

The two principal questons presented are, whether the marriage was proven by legal evidence: and

second, whether dower is governed by the statute of limitations."

"The marriage was proved by her son's testimony, showing that she and his father lived together, and brought up a large family, treated each other on all occasions as husband and wife, were so reputed in the family and by others, addressed each other as such and jointly signed papers in that relation."

"We know of no authority which requires any better proof of a marriage, unless in criminal prosecutions and cases of seduction. There is no rule of law making marriage records the best evidence in any case, and even where they exist some parol evidence is usually necessary to identify the parties in case of any controversy. In most cases where the right to property is to be made out by proof of a marriage, the witnesses who were present are not living or attainable, one or both of the married persons must die before any inheritance or dower can exist."

"It would be impossible in a majority of such cases to prove a marriage by any better testimony than conduct and reputation. The general presumption in favor of legality has led to more liberal rules instead of stricter ones, in modern times, as more just and reasonable.

1 Startee Ev. 45.
Hutchins vs. Kimmell 31 Mich. 126.
2 Greenl. Ev. § 642.
3 Edwards' Ed. Phillips' Ev. 599, 2 cases."

Can there then, in the light of these cases, be any question as to the view taken of this statute by the Supreme Court of Michigan?

That the view taken of and construction given the Michigan statute by the court in Pittsburgh, in the

cases at bar, was not in accordance with the view taken in Michigan, requires no argument to demonstrate.

Without attempting to pursue this question farther, I submit that the better, wiser and safer rule, and the one most in accordance with, and likely to promote good morals, is for courts to hold all persons married, who have endeavored to or supposed they were entering into a valid marriage agreement, and who relying thereon have lived and cohabited together as husband and wife, in all cases where the statute law of the country does not declare such a marriage void.

To uphold such marriages, prevents parties from entering into such relations for illicit purposes.

It is for the "highest good of the parties, of their children, and of the community, that all intercourse between the sexes in its nature matrimonial should be such in fact; the law, when administered by enlightened judges, seizes upon all presumptions, both of law and of fact, presses into its service all things which can keep it in each particular case, to sustain marriage and repel the conclusion of unlawful commerce." (1 Bishop, §457).

One fact farther. A large number of marriages in Michigan were entered into at an early day, between white men and Indian girls. It was not then considered beneath a white man's dignity to marry an Indian maiden. Many of the early French settlers in Michigan received and dealt with the Indians on terms of equality and they lived together on the kindest terms. Many marriages were then entered into where no minister or magistrate was present, and in many cases where the parties were married by a minister or a magistrate, evidence of that fact

could not to-day be produced. Yet all such marriages have ever been considered as valid and their offspring as legitimate, and any decision announced at the present day, holding such marriages illegal, or requiring proof of a marriage solemnized, as was here required would work in many cases the grossest hardships, and disturb the quiet, peace and happiness of many families.

V.

As to the admissibility and effect of the evidence to prove custom among the Indians, and that polygamy was practiced amongst them, but little need be said.

Had it appeared that William Mowry and Mary agreed only to live together during pleasure, then some question might arise as to the validity of such an agreement, but the evidence showed a directly contrary agreement.

The very most that can be claimed for such a custom would be that proof thereof might have been admitted and considered, with the other proofs in the case, as an aid in determining whether a marriage had or had not been entered into.

Let us test this kind of evidence even for such a purpose. It is notorious that in some of the states divorces have been obtained almost at the pleasure of the parties, or one of them. Could such a fact be shown for the purpose of rendering invalid, marriage entered into in one of those states?

Could such a custom be shown, even if supported with proof, that the parties before and at the time they were married recognized and talked over the fact that a separation could afterwards be obtained at the pleasure of one or both the parties? Clearly

not. The law would not recognize, or tolerate the recognition of such a custom or agreement.

Admit that such a custom or agreement might be shown, and a way will be pointed out that will do away with the necessity even of a divorce as a matter of form.

So with the claim as to polygamy.

Polygamy it is supposed has been pretty generally practiced at Utah. Could such a practice be introduced and shown, to render a marriage solemnized in Utah and otherwise legal, illegal; even when coupled with the fact that one of the parties or even both were Mormons?

I had supposed that even the late Brigham Young's first marriage was considered a valid one. The second and subsequent marriages, while the first wife was living would be void; but the first would in no way be affected thereby.

A more singular rule than this, as to custom and polygamy, as claimed and held on the trial of these cases in the court below, or one that would more clearly open the door to illicit intercourse between the sexes, was never before laid down by a respectable court. Yet it was no worse in this respect than many of the other rulings in these cases.

During the reign of the Bloody Queen Mary, Rogers, prebendary of St. Paul's, was tried and convicted. When brought up to be sentenced, he said that his poor wife, being a German woman and a stranger in the land, he hoped might be allowed to come to speak to him before he died. The inhuman Chancellor Gardner replied, that she was not his wife. "Yea, but she is, my Lord," said Rogers, "and she hath been my wife these eighteen years".

His request was refused. So hath it been ever; that courts in some instances, the church in many, have for some cause or other, denied the validity of marriages. History, however, condemns all such decisions, and a more enlightened age has scarcely ever failed to recognize the justice of such condemnations.

If it is said that Mary was not the wife of William Mowry, I reply in the words of Rogers: "Yea, but she was his wife for seven long years," and now at this late day shall it be said she was not, and his child declared illegitimate, because he so far forgot his superiority as a white man, as to dare marry one of a different race.

Clearly the judgment in each case should be reversed and a new trial ordered.

ISAAC MARSTON,

Of counsel for plaintiff in error.

IN THE

Supreme Court of the United States

No. 260.

BERNARD L. MEISTER,

Plaintiff in Error,

VERSUS

ROBERT C. MOORE, et al.,

Defendants in Error.

No. 261.

BERNARD L. MEISTER,

Plaintiff in Error,

VERSUS

F. S. BISSELL, et al.,

Defendants in Error.

Error to the Circuit Court of the United States, for the Western District of Pennsylvania.

Brief for Defendants in Error.

M. W. ACHESON,
J. S. MORRISON,
Attorneys for Defendants in Error.

PITTSBURGH:
A. A. ANDERSON & SON, BOOK AND JOB PRINTERS, 99 FIFTH AVE.
1878

IN THE

Supreme Court of the United States.

No. 260.

BERNARD L. MEISTER, Plaintiff in Error,

versus

ROBERT C. MOORE, JOHN A. MOORE, CHRISTIAN SEIBERT, JOHN SEIBERT, PETER KEIL, ANDREW CARNEGIE, GEORGE KLOMAN, ANDREW KLOMAN, THOMAS M. CARNEGIE, BENJAMIN DARLINGTON, THE KEYSTONE BRIDGE COMPANY, and THE ALLEGHENY CEMETERY, Defendants in Error.

No. 261.

BERNARD L. MEISTER, Plaintiff in Error,

versus

F. S. BISSELL, JOSEPH KAUFMAN, SIMON KAUFMAN, and MOSES OPPENHEIMER.

BRIEF FOR DEFENDANTS IN ERROR.

Error to the Circuit Court of the United States for the Western District of Pennsylvania.

Counter Statement of the Defendants in Error.

In the fall of the year 1845, William Mowry, a young man of good social position and wealth, left his native city (Pittsburgh, Pa.,) to sojourn in the Saginaw Valley, in the State of Michigan. He remained there at that time less than six months, when he returned to his home in Pennsylvania. He subsequently re-visited Michigan twice or thrice, remaining there on none of these occasions more than two or three months. He died at his mother's residence, at Pittsburgh, in the year 1852.

He died seized of valuable real estate in Pennsylvania, much of which, since his death, has been sub-divided and sold to innocent parties, who have made costly improvements thereon.

These actions of ejectment were brought in the court below October 9th, 1873, and were the first notice the defendants had of any claim hostile to their title.

Bernard L. Meister, the plaintiff below, claimed title to the premises in controversy in these cases as alienee of an Indian woman, Misquawassum, (now and for more than twenty years the wife of Cubbaquit, a Chippeway Indian,) and her daughter Elizabeth Isaacs; the plaintiff alleging that, in the fall of 1845, a marriage took place in the State of Michigan, between William Mowry and Misquawassum, and that Elizabeth was the fruit of that marriage. The deed of conveyance from these women and their husbands to Meister—executed in the State of Michigan—bears date

August 27th, 1873, and embraces all the real estate of which William Mowry died seized.

The consideration recited in this deed as having been paid the grantors is the sum of $50,000; but the Indian woman testified that the only consideration ever received by them was three dollars, which Meister paid her, and ten dollars which he paid her daughter, together with the clothing in which the women appeared in court, and "a little provisions." [*Vide* page 24 of printed record.] She did, however, further testify, that the bargain between Meister and herself and daughter was, that he was to carry on the suits at his own expense, and if he prevailed at law, Meister was to give them the one-fourth of the lands recovered. [*Vide* printed record, page 25.]

The plaintiff—it is important to observe—did not rely upon a *presumption of marriage* arising from alleged cohabitation and reputation. But he undertook to prove the *fact of marriage*, with time, place and attending circumstances; and to this end called and examined as a witness the woman herself—Mowry's alleged wife. Her evidence touchingthe alleged marriage will be found in the bill of exceptions, at pages 19 and 20 of the printed record, and also in the body of the ensuing argument.

The defence in the court below was—

1. That the plaintiff's evidence (even if true) did not establish a valid marriage between William Mowry and the Indian woman under the statute of Michigan regulating the solemnization of marriage.

2. That the plaintiff's own evidence utterly failed to establish *a valid marriage at common law*.

The court below held, that as the plaintiff's own proof was that neither minister nor magistrate was present at the alleged marriage, it was invalid under the statutes of Michigan.

THE REVISED STATUTES OF MICHIGAN

Adopted in the year 1838, and in force at the time of the alleged marriage, upon the subject of the solemnization of marriages, enact as follows:

"Sec. 6. Marriages may be solemnized by any justice of the peace, in the county in which he is chosen; and they may be solemnized throughout the State by any minister of the gospel who has been ordained according to the usages of his denomination, and who resides within this State, and continues to preach the gospel.

"Sec. 8. In the solemnization of marriage no particular form shall be required, *except* that the parties *shall solemnly declare, in the presence of the magistrate or minister and the attending witnesses*, that they take each other as husband and wife. In every case there shall be at least two witnesses, besides the minister or magistrate, present at the ceremony.

"Sec. 14. No marriage, solemnized before any person professing to be a justice of the peace or a minister of the gospel, *shall be deemed or adjudged* TO BE VOID, nor shall the validity thereof be in any way affected on account of any want of jurisdiction or authority in such supposed justice or minister, PROVIDED, that the marriage be *consummated with a full belief, on the part of the persons so married, or either of them, that they have been lawfully joined in marriage.*

"Sec. 15. The preceding provisions, so far as they relate to the manner of solemnizing marriages, *shall not affect marriages among the people called Friends or Quakers, nor marriages among the people called Menonists;* but such marriages may be solemnized in the manner heretofore used and practiced in their respective societies." *Revised Statutes of* 1838, pp. 334 and 335.

ARGUMENT FOR DEFENDANTS IN ERROR.

ASSIGNMENTS OF ERROR VI AND VII.—These assignments will be first treated, as the questions intended to be raised thereby go to the root of the case.

This argument will be directed mainly to show, 1st, that the court below was right in its ruling upon the statute law of the State of Michigan regulating marriage; and, 2d, that the plaintiff not only failed to prove a valid marriage *at common law*, but BY HIS OWN PROOFS *established the contrary*.

FIRST. In his charge to the jury, Judge McKennan says—

"It is obvious, then, that the fundamental question in the case is, whether the Indian woman alleged to have been Mowry's wife was united to him by a valid marriage, and this is to be determined by the laws of the State where the marriage contract was made. The alleged marriage took place in the State of Michigan, in the latter part of the year 1845. From 1833, when the present State of Michigan was a Territory, down to the present time, a statute in relation to marriage has been in force, and during that period it has remained without essential change, so far as we are advised, and we have had the benefit of the knowledge and researches of learned counsel from that State on both sides of these cases. There has not been any judicial construction of that statute, or any determination of its effect upon the marriage contract, not made in conformity with its requirements. The only case touching it, to which

we have been referred, decides that in so far as the age of consent is fixed by it, the common law is abrogated. [The People vs. Slack, 15 *Mich.*, 198.] We are therefore left without the guidance of an authoritative exposition to ascertain its meaning, and declare its effect upon the marriage in question.

"The sixth section of the act authorizes the solemnization of marriages by justices of the peace within the counties for which they are respectively chosen, and by resident or ordained ministers of any denomination at any place within the State.

"By the eighth section it is provided that 'in the solemnization of marriages no particular form shall be required, except that the parties shall solemnly declare in the presence of the magistrate or minister and the attending witnesses that they take each other for husband and wife. In every case there shall be at least two witnesses besides the magistrate or minister present at the ceremony.' The requirements of the section are imperative and its meaning clear. It is expressly applicable to every case of the solemnization of marriage, or, in other words, the proposed creation of the marriage relation. No particular form is required to be observed in any case, but a magistrate or minister as prescribed in the sixth section, and two witnesses shall be present, and before them the parties shall solemnly declare their assent to the contract."

* * * * * * * * * *

"If the jury, therefore, find that neither a minister nor magistrate was present at the alleged marriage of William Mowry and the daughter of the Indian Pero—and such is the plaintiff's own proof—they are instructed that such marriage was invalid under the Michigan statute, and their verdict in such case should be for the defendants."

The very able charge of the learned judge appears at length at the end of this brief, and to it we confidently refer in vindication of the first branch of the defence.

The inference to be drawn from the fourteenth and fifteenth sections of the statute—which exempt from the operation of the eighth section marriages among Quakers and Mennonists, and legalize marriages solemnized in the presence of one *falsely professing to be a magistrate or minister*, where the marriage is *consummated* with a full *belief on the part of the persons marrying, or either of them, that they were lawfully joined in marriage*—furnishes an irresistable argument in favor of the views of the Court below upon the construction and effect of the eighth section.

The following authorities may be cited in support of the ruling of the court below:

In Holmes vs. Holmes, 1 *Abbott's U. S. Reports*, 525, Ninth Circuit, Oregon, Judge Deady, after quoting *Oregon Code*, 783, which contains provisions similar to, if not identical with, the provisions of the eighth section of the Michigan Act, says: "The consent to become husband and wife—the contract out of which arises the relation—must be given as herein prescribed before a person authorized to solemnize marriage, and in the presence of two witnesses. Without the observance of these formalities the marriage relation, it seems to me, cannot be created within the States of Oregon or California, particularly the former. Neither ought it to be. To prevent fraud and litigation the law wisely requires certain contracts to be in writing, and signed by the parties. A single rood of land cannot be conveyed except by the deed of the vendor.

How much more important it is to society and individuals that the contract upon which rests the marriage relation, the most important of all others, should not be made except with such attending circumstances and formalities as will serve to manifest the consent of the parties beyond question, and also preserve the evidence of it."

This case of Holmes vs. Holmes was in the Supreme Court of the United States upon appeal to October Term, 1874 (No. 91), and the decree of the Circuit Court for the district of Oregon was affirmed.

In the State of Massachusetts it was prescribed by statute that marriages be solemnized in the presence and with the assent of a magistrate or a stated and ordained minister of the gospel.

In Milford vs. Worcester, 7 *Mass.*, 48, a certain man and woman came before a magistrate, authorized to celebrate marriage, and requested him to marry them. He refused; but the parties then and there, in the presence of the magistrate and other witnesses, declared that they took one another for lawful husband and wife, each making to the other the vows and promises usual in contracting marriage. The statute did not require any form of words for the solemnization of marriage; but that the contract was to be solemnized before, and with the assent of, a justice of the peace or minister. The action was by the issue of these parties, claiming to be their legitimate children; and the question was, whether there was a valid marriage or not, between their parents; and it was determined in the negative. Parson, Ch. J., delivered the opinion of the court. In the course of it he says:

"Marriage being essential to the peace and harmony, and to the virtues and improvement of civil society, it has been, in all well regulated governments, among the first attentions of the civil magistrate to regulate marriages; by defining the character and relations of the parties who may marry, so as to prevent a conflict of duties, and to preserve the purity of families; by prescribing the solemnities by which the contract shall be executed, so as to guard against fraud, surprise, and seduction; by annexing civil rights to the parties and their issue to encourage marriage, and discountenance wanton and lascivious cohabitation, which, if not checked, is followed by prostration of morals and dissolution of manners; and by declaring the causes, and the judicature for rescinding the contract, when the conduct of either party and the interest of the State authorize a dissolution. *A marriage contracted by parties authorized by law to contract, and solemnized in the manner prescribed by law, is a lawful marriage; and to no other marriage are incident the rights and privileges secured to husband and wife, and to the issue of the marriage.*

"It has been truly observed by the counsel for the plaintiffs, that a marriage engagment of this kind is *not declared void by any statute.* But we cannot thence conclude that it is recognized as valid, unless we render, in a great measure, nugatory all the statute regulations on the subject.

"But a marriage, merely the effect of a mutual engagement between the parties, or solemnized by any one not a justice of the peace or an ordained minister, is not a *legal marriage*, entitled to the incidents of a marriage duly solemnized. The woman when a widow cannot claim dower, nor the issue seizen by descent.

"Where the laws of any State have prescribed no regulations for the celebration of marriages, a mutual agree-

ment to intermarry, by parties competent to make such contract, would, in a moral view, be a good marriage, and would impugn no law of the state. But when civil government has established regulations for the due celebration of marriages, it is the duty, as well as the interest, of all the citizens to conform to such regulations. A deviation from them may tend to introduce fraud and surprises in the contract; or by a celebration without witnesses, the vilest seduction may be practised under the pretext of matrimony. When therefore, the statute enacts that no person but a justice or minister shall solemnize a marriage, and that only in certain cases the parties are themselves prohibited from solemnizing their own marriage by any form of engagement, or in the presence of any witnesses whatever." *Ibid*, 55.

In Ligonia vs. Buxton, 2 *Greenl.*, 95, the Supreme Court of Maine held that a marriage solemnized by one not a stated and ordained minister of the gospel, and celebrated in a town where neither of the parties resided, was invalid under the provisions of the statute regulating the solemnization of marriages in that State.

In Indiana marriages are required to be solemnized by a clergyman, judge, or justice, under the authority of a license from the clerk of the Circuit Court of the county. 2 *Kent*, 95, *note d.*, *R. Statutes of Indiana*, 1838.

It was held in Roche vs. Washington, 19. *Ind.*, 53, that a contract of marriage, formed in Indiana, between residents of the State of Indiana, to be valid must conform to the laws of the State. "And a marriage between a male and female of the Miami tribe of Indians, formed according to the customs of the tribe, while the parties were resi-

dents in Indiana, cannot be recognized as a valid marriage under the laws of Indiana." *Ibid.*

In North Carolina a succession of statutes in 1715, 1741, 1776, and 1778, regulated marriages, and Tennessee adopted the statute law of her parent State. 2 *Kent*, 91, *note C.*

In the first named State (North Carolina), in the case of The State vs. Samuel, 2 *Dev. & Bat.*, 177, 181, it was held that a contract of marriage *per verba de præsenti*, though followed by cohabitation, was not a legal marriage in that State, unless celebrated by some person in a sacred office, or entered into before some one in a public station and judicial trust.

In this case Chief Justice Ruffin forcibly observes: "While as to other contracts security is provided in various ceremonies and solemnities, a well regulated State could not leave that of marriage—the most important of all in reference to the happiness of the parties and their issue, and to the right of succession to estates—to be established or denied upon the loose testimony of, perhaps, a single witness speaking entirely from memory of the words of the parties." *Ibid.* 181.

"Marriage, or the relation of husband and wife" (says Gaston, J., in State vs. Patterson, 2 *Ire., N. C.*, 355) "is, in law, complete when parties able to contract and willing to contract actually have contracted to be man and wife in the forms and with the solemnities required by law."

And it was held in Tennessee that to constitute a valid marriage, under the Acts of Assembly of North Carolina and Tennessee, two things are necessary: 1st, a lawful and proper authority authorizing the solemnization of the marriage; 2d, a solemnization of the marriage and performance of the marriage ceremony by a person duly qualified by those acts. Bashaw vs. The State of Tennessee, 1 *Verger*, 177; Grisham vs. State of Tennessee, 2 *Verg.*, 589.

In enacting the Michigan statute regulating the solemnization of marriage, the law makers but conformed to the enlightened judgment of mankind that the marriage relation should not be created without such attending formalities as "will serve to manifest the consent of the parties beyond question, and preserve the evidence of it." The loosely contracted matrimonial alliances, seemingly sanctioned by the common law, are attended with undoubted evils which the statute in question was designed to prevent. The observations of Byrd, J., in Robertson vs. The State, 42 *Ala.*, 509, are worthy of reproduction here. Commenting on the section of the Alabama Code which declares that "no marriage shall be solemnized without license," he says:

"The code, no doubt, intended to discountenance the tendencies of the age to free-loveism and mormonism. The very difficulty of proving such marriages is an encouragement to the latter, and the ease with which they may be discarded is a stimulus to the former." * * * *

"That inconveniences may arise from a rigid adherence to this rule is true; but it will cut off a great many irregular-

ities and wrongs which, under the indulgent usages and principles of the ancient common law, will necessarily take place, to the great detriment and shame of families. It will put an end to the private and secret marriages which are so productive of evil, and throw an obstacle in the way to the ruin of the innocent under the promise of marriage, and the idea that a cohabitation with the promise makes a good marriage, which is held out to the victims of the vicious and unscrupulous, to accomplish their nefarious purposes." *Ibid*, 512–513.

The meaning of the Michigan statute is plain; its purpose wise; its requirements imperative. It was originally enacted as early as 1833, when the present State was yet a Territory. It was re-enacted in 1838, after the admission of the State into the Union, and twice more recently—in 1846 and 1851—without substantial change. The learned judge below rightly said, that "it is a cherished feature of the policy of the State in reference to a subject which it has wisely undertaken to regulate."

To treat the requirements of the statute as merely directory, would practically nullify it, and work a judicial repeal thereof. We here may aptly quote what was said in Bashaw vs. The State, 1 *Yerg*., 184–5, when the Supreme Court of Tennessee was urged to declare that all the provisions of the statutes of North Carolina and Tennessee regulating marriage were directory only: "We say that these requirements, under these circumstances, constitute such a body of proof as to render irresistable, in our opinion, the correctness of the position, that a marriage to be valid must be according to these acts, and that the common law is wholly superseded by them. To say otherwise, would

be not only to prostrate the well directed labors of the Legislature on the subject for the last one hundred years, but on our part, the expression of a gratuitous and improper assumption that the Legislature did not intend what they have so repeatedly and expressly declared."

If the eighth section of the Michigan statute was intended by the legislature as merely directory, why the provisions of the fourteenth section—that "no marriage solemnized before any person professing to be a justice of the peace, or a minister of the gospel, shall be *deemed or adjudged to be void*, nor shall the validity thereof be in any way affected, on account of any want of jurisdiction or authority in such supposed justice or minister, PROVIDED that the marriage be *consummated with a full belief on the part of the persons marrying, or either of them, that they have lawfully been joined in marriage?*"

Affirmatives in statutes that introduce a new rule, imply a negative of all that is not within the purview. *Hob. Rep.* 298, (case of Slade vs. Drake.) And when a statute limits a thing to be done in a particular form, it includes in itself a negative, viz., that it shall not be done otherwise. *Plowd.* 206, *b*, (case, Stradling vs. Morgan.)

When a statute is silent, and contains nothing for which the contrary can be inferred, a contract in contravention of it is void. Mitchell vs. Smith, 1 *Binney*, 118; Bank vs. Haldeman, 7 *Watts & Ser.*, 233.

The plaintiff in error, however, relies upon two cases decided by the Supreme Court of Michigan since the present cases were tried in the court below. Hutchins vs. Kimmell, 31 *Mich.*, 126, and Proctor vs. Bigelow, (unreported.)

But if these cases were all that is claimed for them, it by no means follows that they would require the reversal of the judgments of the Circuit Court, as the decisions were made since the trial below. Morgan vs. Curtenius, 20 *How.*, 1.

In fact, however, in neither of the Michigan cases relied on was the question now before this court involved or decided.

In Hutchins vs. Kimmell, the proof was that the marriage in question was "in due form, and properly solemnized" at Winesberg, in the Kingdom of Wurtemberg, and that the ceremony was performed by a pastor of the Evangelist Lutheran Church at Winesberg, "who had lawful authority to perform the same." The action being for *crim. con.*, it was objected that there should be "proof of the foreign law regulating marriage in Wurtemberg," and affirmative proof that the "ceremony was recognized by, and in accordance with the law of the country where it took place." (31 *Mich.*, 129.) The judge who tried the case, held that proof of the foreign law was not necessary, and that, *prima facie*, the marriage under the proofs was valid. This ruling the Supreme Court of Michigan affirmed. *To this extent, and to this only*, the case is authoritative. The construction or effect of the Michigan statute regulating the solemnization of marriage in that State was in no wise involved in the case, and was not passed on by the court.

The portions of the opinion quoted at pages 14 and 15 of the Brief of the plaintiff in error, are entirely by way of *obiter dicta*. Moreover, these *dicta* are not sustained by the "large number of authorities" cited in the opinion For

the most part the cases cited, either have relation to the validy of marriages contracted, *per verba de præsenti, in the absence of any statutory regulations to the contrary*, or they merely recognize the well-known rule that a lawful marriage may be *presumed* from cohabitation as man and wife, and the acts and declarations of the parties. In a very few of these cases the statutory regulations are said to be directory and the marriage valid notwithstanding a want of compliance therewith; but in every such instance the marriage was, in fact, solemnized by a clergyman or State functionary, and in no case was the statute in the terms of the Michigan Act.

This court has said that it cannot rest its judgment upon an opinion of a State court concerning the construction of a statute of the State, if it was not necessary to construe the statute in order to decide the case in which the opinion was pronounced. Under such circumstances, this court will examine the question of construction and decide it as it seems to it right. Carroll vs. Carroll, 16 *How.*, 275, 287.

The unreported case of Proctor vs. Bigelow was an action of dower, in which it was proved by the plaintiff's son that his mother (the plaintiff) and his deceased father had cohabited for many years, reared a large family, treated each other on all occasions as husband and wife, were so reputed in the family and by others, addressed each other as such, and jointly signed papers in that relation. It is needless to say that the Supreme Court of Michigan held this evidence presumptive proof that a

marriage had been legally solemnized. The opinion does not so much as allude to the statute in question.

The plaintiff in error also places reliance upon the case of Commonwealth vs. Jackson, 11 *Bush*, (*Ky.*) 679, and The State vs. Worthington (a Minnesota case), reported in *Chicago Legal News* of June 16th, 1877.

But Commonwealth vs. Jackson involved no question as to the effect of such a statute as the Michigan Marriage Act, and such question is not even discussed by the court. The case simply decides that in a prosecution for bigamy the marriage of the defendant may be shown by proof of cohabitation, conduct, declarations and admissions.

Of The State vs. Worthington it is sufficient to say that the 1st section of the Minnesota statute is in these words: "Marriage is declared to be a civil contract, to the validity of which, in law, the consent of parties capable in law of contracting *is alone essential*." In view of this legislative declaration the court held the subsequent provisions, as to how and by whom a marriage may be celebrated, as non-essentials.

In concluding this branch of the argument we submit that the views of the learned judge below—so admirably expressed in his charge to the jury—are sound in principle and sustained by the best considered and most authoritative cases on the subject.

We cannot admit as correct the statement made in the plaintiff's brief, that in Michigan, at an early day, many marriages were entered into "between white men and Indian girls" where no minister or magistrate was present. Our information is to the contrary. Nor is the fear that

the affirmance of these judgments will "disturb the quiet, peace and happiness of many families" well founded. These great evils are the rather to be apprehended should Meister's audacious speculation prove successful, and a temporary and meretricious alliance—unblest by priest and unsanctioned by magistrate—be confounded with the holy estate of matrimony.

SECOND. Thus far the case has been considered only as affected by the Michigan statute regulating the solemnization of marriage. But it is submitted that THE PLAINTIFF'S OWN PROOFS not only failed to establish *a valid marriage at common law, but showed the contrary.* And if this be so, then there is no sufficient ground for reversal, even if this court should differ with the court below upon the question of the construction and effect of the Michigan statute. For is well settled that if the record shows that the case of the plaintiff in error is inherently defective, so that no other result could be obtained on a new trial, the judgment will not be reversed for instructions, however erroneous. Barth vs. Clise, 12 *Wallace*, 401; Walburn vs. Babbitt, 16 *Wallace*, 577, 581.

The bill of exceptions exhibits fully the evidence upon which the plaintiff below relied to prove the alleged marriage between William Mowry and the Indian woman, and to this evidence let us now refer.

If the testimony of the plaintiff's witness, Michael Daily, [*vide* printed record, page 13, *et seq.*,] be accepted as true, it is manifest therefrom that marriage was not in the contemplation of Mowry *or of any of the parties*, when he was

negotiating "to get this woman." In these negotiations (according to Daily's story) Mowry sought the intercessory services of no less than four persons, viz: Daily, Ashman, Pelke and Graveroad. Daily, when asked to "use his influence in getting her," refused even to speak on the subject of Mowry's desires, either to the woman herself or to her father, Pero—telling Mowry, "*I would not like to do it.*" Pelke, (although "one of the family,") when requested to speak to Pero, demurred, lest he should "*get into trouble.*" WHY the reluctance of these men to approach the woman or her father, if they understood they were to be bearers of a proposal of marriage from a young man of good family and fortune? Graveroad—who would seem to have had neither scruples of conscience nor fear of trouble—brought together Mowry and Pero at "Baccus' store." What occurred between them upon that occasion is related by Daily, at pages 16 and 17 of the printed record, and no one can read the narrative and fail to perceive that, if true, the young man was bargaining for a paramour and not a wife.

Within one or two days after this interview between Mowry and Pero the marriage, it is claimed, took place at the latter's cabin, at Kawkawlin, an Indian community.

The pretended wife was called by the plaintiff for the express purpose of proving a marriage in fact, between herself and Mowry, at the time and place above mentioned. But her testimony shows affirmatively and conclusively that there was, in fact, no actual marriage, or present agreement to marry, entered into between these parties at the time and place alleged. Taking her testimony altogether, it utterly fails to prove a marriage in fact. It shows that

she did not join in the conversation which was carried on between her father and Mowry. It shows further, that she could not intelligently assent or agree to what was said, or vaguely intimated or referred to, by Mowry in that conversation, as he spoke to her father in a language she did not understand. The most that can be said is, that she sat quiet and speechless during the conversation carried on in her presence between Mowry and her father. Mowry and the Indian woman entered into no engagement, made no mutual vows, interchanged no promises, either in words of the present or future time.

For convenience we here insert the testimony of the Indian woman [as given through an interpreter] upon the subject of the alleged marriage.

Q. Ask her if she ever saw him [Mowry] at Caucallin [Kawkawlin]?

A. Seen him.

Q. Whereabouts there?

A. At her father's house.

Q. Ask her to tell what he was doing there; what he said and did when he first came?

A. "I came for that purpose," what I have said before, and that they were sent [said?] to Peroe, her father. [Cloud said] "I came here for that purpose; what I said before."

Q. [To the interpreter.] Who was that said to?

A. *To Peroe.*

Q. Who said it?

A. Mowry.

Q. Ask her what reply did Mowry make?

A. She said her father said, "If you tell the truth, what you say now, I will let you go."

Q. What did Mowry say in reply, if anything?

A. Mowry said "I tell the truth."

The answer is, Mowry said, "I tell the truth; I want to marry her"

Q. Ask her whether at that time Mowry or her father said anything to her about it.

A. I am satisfied if you will do that.

Q. Ask her whether she said anything.

A. Yes, she answered, that she would marry William.

Q. Who did she make that answer to?

A. *Her father.*

Q. Was Mowry there when she made that answer?

A. Yes.

Q. Where did Mowry go after she said that?

A. *He went back to his store.*

Q. Ask her whether he spoke to her at that time; what he said before going back.

A. William Mowry said to her "my wife."

Q. Ask her to tell what was said when Mowry was there.

A. Peroe said to her, "*This is the one that is going to take care of you.*"

Q. Is that all?

A. Peroe said that would be satisfactory; what he wants to do.

Q. Ask her where William Mowry staid that night.

A. Slept with me.

Q. Whereat; whose house?

A. At her father's. (*Vide* pp. 19 and 20 of printed record.)

In this connection we refer to a portion of the woman's testimony, to be found at page 26 of the printed record.

Q. Ask her, if before William came to her father's house first, she knew he was going to come, and what he was come for.

A. No; William did not say it.

Q. Ask her if anybody else said it to her.

A. No.

Can it be successfully maintained that the foregoing evidence establishes a marriage contract *per verba de praesenti*? Does it indicate a present assumption of the marriage relation? Words of promise, in order to constitute a marriage, must contemplate a present, not a future, assumption of the status. *Schouler's Domestic Relations*, 41. Where does it appear in this testimony that "the parties agreed presently to take each other for husband and wife?" At the close of the colloquy, when Mowry quit Pero's cabin and "went back to his store," was he united in the bonds of matrimony to the Indian woman? Is the contract of marriage—the most important of all human transactions and "the very basis of the whole fabric of civilized society"—to be inferred from language which at best is so vague, uncertain and equivocal?

Pero's remark to Mi-quawassum—"*this is the one that is going to take care of you*"—is most significant and points to a connection (to use the words of Mr. Justice Field in Letters vs. Cady, 10 *Cal.*, 527) "to which it would be a perversion of language to apply the name of marriage."

Be it remembered that this alleged marriage was asserted for the first time, more than twenty years after William Mowry had descended to the grave. And by *whom?* A desperate speculator, who, for a mere trifle, procured a deed

of conveyance from the Indian woman and her daughter, and who in the transaction was guilty, by his own showing, of the common law offence of champerty. (*Vide* printed record, page 25.)

In support of the position that the plaintiff's proofs wholly failed to establish a valid marriage at common law, reference is made to the following authorities :

In Letters vs. Cady, 10 *Cal.*, 527, the plaintiff sued as the widow of Cady for a share of his estate. Her complaint avowed that in 1853, she "was keeping a restaurant and public saloon in Grass Valley, and that she had accumulated in this business five or six hundred dollars; that the deceased made proposals of marriage to her, which she accepted, and consented to live with him as his true and lawful wife; that, in accordance with his wishes, she relinquished her business, sold her property, and from thenceforth lived and cohabited with him as his wife, always conducting herself as a true and faithful and affectionate wife should do."

There was a demurrer to the complaint. Mr. Justice Field delivered the opinion of the court, Baldwin, J., concurring.

After stating the case as above, the opinion proceeds : "These are all the averments respecting the marriage, and they are entirely insufficient. *The facts alleged do not constitute a marriage.* They are only *prima facie* evidence of a marriage. *Living together as man and wife is not marriage, nor is an agreement so to live a contract of marriage.* From the character of the allegations, and the pregnant fact that the plaintiff does not even sue in her marital name, except

under an alias. we are led to the inference that the arrangement between her and the deceased was intended to be temporary, and the connection one to which it would be a perversion of language to apply the name of marriage."

Marriage (say the Supreme Court of Pennsylvania) is a civil contract, which may be completed by any words in the present time, without regard to form, but if a man says to a woman, "I take you for my wife," and the woman answers, "to be sure he is my husband good enough," referring to a past illegal marriage and cohabitation, this is no marriage. Hantz vs. Sealy, 6 *Binn.* (Pa.), 405.

In this case Chief Justice Tilghman says, "The defendant pleaded that he was married to the plaintiff, on which issue was joined, and it was objected that the judge ought to have directed the jury that the evidence proved the marriage. The judge laid down the law correctly. He told the jury that marriage was a civil contract, which might be completed by any words in the present time, without regard to form. He told them also that in his opinion the words proved did not constitute a marriage, and in this I agree with him. The plaintiff and defendant came to their lawyer, Mr. Watts, on business, without any intention of marrying. They had long lived in an adulterous intercourse, although they considered themselves as lawfully married. In fact they had entered into a marriage contract, which was void, because the defendant had a former wife living, from whom he had been separated by consent but not legally. Sometime before the parties came to Mr. Watts, a legal divorce had been pronounced, and Mr. Watts advised them to celebrate

a new marriage. The defendant said, "I take you (the plaintiff) for my wife," and the plaintiff being told that if she would say the same thing the marriage would be complete, answered, "to be sure he is my husband good enough." Now, these words of the woman do not constitute a present contract, but allude to the past contract, which she always asserted to be a lawful marriage. Mr. Watts advised them to repeat the marriage in a solemn manner before a clergyman, which was never done. So that under all the circumstances, it appears to me, that what was done was too slight and too equivocal to establish a marriage."

In Commonwealth vs. Stump, 53 *Penn. State Rep.*, 136, the evidence of a marriage between Abraham Stump and Jane, his alleged wife, was the oath of the latter, who swore that "about thirty-one years since she went to the house of said Abraham Stump, to live with and keep house for him, under the mutual promise and agreement that they would sustain towards each other the relation of husband and wife, and that they did so live and cohabit together." Upon this proof the Supreme Court of Pennsylvania (Chief Justice Woodward delivering the opinion) say:

"In our opinion, this was not proof of a marriage in fact. Marriage is in law a civil contract and does not require any particular form of solemnization before officers of church or State, *but it must be evidenced by words in the present tense*, uttered with a view and for the purpose of establishing the relation of husband and wife, and like all other civil contracts, should be proved either by the signature of the parties or by witnesses who were present when it was made." *Ibid.*

But it may be said that if the evidence in this case fails to prove a marriage in fact, or a contract of marriage *per verba de præsenti*, it is at least sufficient to establish a contract to marry *per verba de futuro*, and that such a contract, if *copula* follow, constitutes a valid marriage.

But to this we have a two-fold answer:

1st. We deny that the evidence does show mutual promises between Mowry and the Indian woman to marry in the future. Indeed it appears from the testimony that they interchanged no promises of any kind whatsoever. The utmost that can be inferred from the testimony is that they severally intimated to Pero a willingness to enter into an engagement for a future marriage—Mowry addressing Pero in the English language, which the woman did not understand, and she in the Chippaway tongue, which Mowry did not comprehend.

2nd. We affirm that no authoritative case decides that a contract to marry *per verba de futuro*, though followed by cohabitation, constitutes a valid marriage. The cases cited by Chancellor Kent, Mr. Greenleaf, Mr. Bishop and other standard elementary writers, in support of this doctrine, will be found upon examination not to sustain the doctrine or warrant such statement. Moreover, the language of Chancellor Kent is this:

"If the contract be made *per verba de præsenti*, and remains without cohabitation, or if made *per verba de futuro*, and be followed by consummation, it amounts to a valid marriage, *in the absence of all civil regulations to the contrary*." 2 *Kent*, 87.

So also Mr. Greenleaf carefully qualifies his text by the above italicised words. 2 *Gr. on Ev.*, sec. 460.

In 2 *Parsons on Contracts* (6th Ed.), page *79, it is said, "We know of no case in which a mere agreement to marry, with no formality and no compliance with any law or usage regulating marriage, is actually permitted to give both parties and their children the rights, and lay them under the obligations and liabilities, civil and criminal, of a legal marriage."

In Cheney vs. Arnold, 15 *N. Y. Rep.*, (1 *Smith*), 345, the Court of Appeals of the State of New York held that a contract to marry *per verba de futuro*, though followed by cohabitation, does not amount to a marriage in fact, and never constituted a valid marriage at common law.

To the same effect is the well considered case of Duncan vs. Duncan, 10 *Ohio St. Rep.*, 181. The Supreme Court of Ohio here say:

"The idea that a contract for a future marriage, followed by cohabitation as husband and wife, is itself a valid marriage at common law, seems to have obtained currency on the credit of remarks made by several elementary writers of distinguished learning and ability, and by certain judges of high character, speaking by way of *obiter dicta* in cases in which this question was really in no way involved. But the better opinion now seems to be that these remarks are unsupported by any case actually adjudicated and entitled to be considered authoritative, and that such a contract never was a good marriage at common law, either in this country or in England, and the mistaken doctrine seems to have originated, either in the inadvertent confounding of what might, in the absence of rebutting evidence, be good presumptive evidence of a marriage, with

marriage itself, or from the fact that such a contract *per verba de futuro*, followed by cohabitation, was one of which the canon law, as administered by ecclesiastical courts in England, until restrained by statute, would enforce the specific performance." *Ibid.* 184.

Upon this point we also refer to the cases of Letters vs. Cady, *supra*, and Commonwealth vs. Stump, *supra*.

The statement in the plaintiff's brief that Mowry and the Indian woman lived and cohabited together as husband and wife from the time of their alleged marriage until 1850 is founded in mistake. The allegations made in the counter statement in respect to Mowry's return to Pennsylvania, after a sojourn of less than six months in Michigan, and his later visits to and brief residence in that State, are entirely warranted by the facts of the case as clearly proved on the trial.

Taken together the evidence offered by the plaintiff, and appearing of record in the bill of exceptions, does not show such cohabitation between these parties as is alleged.

Michael Daily, a witness called by the plaintiff, testified that three days after the alleged marriage, when he returned to Baccus' store, in which Mowry was then employed, this woman was there with Mowry; that she staid with Mowry that night in the store, and that afterwards Mowry used to have her sometimes at the store with him, and at other times she would be over at her father's, at the Indian settlement called Kawkawlin;" that he is uncertain whether Mowry introduced this woman to him as his wife or his "*woman*;" that he saw them together at a store in Saginaw,

and on the street in Bay City, and that he "did not see *no trouble between them;*" that he saw some of *her* family with them, and that one Ben Pearce was the only *white* man he ever saw with them; that he never saw or heard Mowry introduce the woman, at the store or elsewhere, to any one except himself; that Addison Mowry, a brother of William, when speaking of this woman, called her "Bill's woman," or "Bill's squaw," and that William Mowry lived *part* of the time with this woman, and "*part of the time he would come home here to Pittsburgh.*"

Benjamin Pearce, referred to by Michael Daily, and a witness called by the plaintiff, testified that after the date of the alleged marriage he frequently saw Mowry and this woman together; that Mowry lived with the woman at Kawkawlin, occupying with her a little apartment or addition placed at the back part of her father, Pero's house; that he called at the house once on business and saw Mowry there with this woman and a child; that Mowry brought the child to him and said is not that a nice girl? and remarked if he lived and had his health he would educate the child and make a lady of her.

The woman herself testified that a missionary named Brown said several times that "*they ought to be married,*" and on one occasion came to her father's house at Kawkawlin when Mowry was there, purposely to marry them; and that this missionary said "*they ought to be married, otherwise the child would be poor,*" but notwithstanding Mowry was so urged by the missionary a marriage ceremony was not performed.

Other witnesses, as stated in the record, were examined by the plaintiff and gave testimony relative to seeing Wm. Mowry and this Indian woman together at different times and places between the years 1846 and 1850, ONCE at camp meeting, where they occupied the same tent, and TWICE or THREE TIMES at public houses and other places, on some of which occasions they remained over night and slept together.

Such, in character and substance, as disclosed by the record in this case, is the evidence offered by the plaintiff to prove the intercourse and relations which subsisted between William Mowry and this Indian woman.

We submit that, irrespective of statutory enactment, this evidence, taken together, is wholly inadequate to prove such cohabitation as is requisite and essential to raise even a legal presumption of valid marriage.

But it is constantly to be remembered that the plaintiff did not rest his case upon presumptive evidence of a legal marriage, deducible from cohabitation and reputation. He examined the woman herself to establish the fact of marriage, and his case depends upon the sufficiency or insufficiency of that proof. Blackburn vs. Crawfords, 3 *Wallace*, 194.

Adopting the language of Mr. Justice Swayne in that case, it may be said here that the testimony of the pretended wife was "the hinge upon which turned the controversy." If there was no valid marriage at the time and place alleged by her, "clearly there was none at any time."

It has been well said that cohabitation and reputation conjoined are not sufficient to raise a presumption of mar-

riage, unless they be of such kind as to render the inference irresistible that the contract of marriage has really been entered into. Yardly's Estate, 75 *Penna. St. R.*, 211.

Upon the plaintiff's own proofs it would be a misnomer to call Mowry's visits to and sojourn with this Indian woman, living with her father in an Indian settlement, cohabitation. It would be a greater misnomer to call the occasional visits of the woman to Mowry, while he was employed in Baccus' store, cohabitation. The relation proved between these parties by the plaintiff's own evidence lacks the chief element of cohabitation, constancy of dwelling together.

In Yardly's Estate, *supra*, Chief Justice Agnew, delivering the opinion of the court, says:

"There is no sufficient evidence of marriage in this case. The alleged cohabitation is *partial* and unsatisfactory, and the reputation of marriage is divided, the bulk lying on the side of singleness. The case depends on the alleged cohabitation and reputation of marriage. It was lacking in its chief element, constancy of dwelling together. Loose notions seem to prevail as to what cohabitation is. It is *not a sojourn*, nor a habit of visiting, nor even a remaining with for a time. None of these fall within the true idea of cohabitation as a fact presumptive of marriage. *Neither cohabitation nor reputation of marriage, nor both, is marriage.* When conjoined they are evidence from which a presumption of marriage arises. The legal idea of cohabitation is that which carries with it a natural belief that it results from marriage only. To cohabit is to live or dwell together; to have the same habitation; so that where one lives and dwells there does the other live and dwell *always* with him. Irregularity in these elements is at once a rea-

son to think there is irregularity in the life itself the parties lead; unless attended by independent facts, which aid in the proof of marriage. Without concomitant facts to prove marriage, such an *irregular* cohabitation and partial reputation of marriage avail nothing in the proof of marriage."

If upon the plaintiff's own proofs the marriage in question was invalid, either for want of compliance with the statutory requirements, or as lacking the essentials of a good common law marriage, the assignments of error which relate to the admission or rejection of evidence, would seem to be unimportant. It is, however, proper that these assignments should be here discussed.

Assignment of Error I. The plaintiff below, as already more than once suggested, called Mowry's alleged wife to prove the fact of marriage, with time and place. He was therefore, it seems to us, precluded from resorting to the rejected evidence embraced in his offer A, which at best was secondary and merely presumptive evidence of marriage. The woman did not pretend, nor did the plaintiff, that a marriage took place at any other time or place than as stated by her. Therefore, on this ground alone, evidence of general reputation was inadmissible. Blackburn vs. Crawfords, 3 *Wallace*, 194.

But in every point of view, the court was right in rejecting the plaintiff's offer to prove by Michael Daily "that in the community in which these parties lived they were reputed and recognized to be man and wife."

This part of the offer was objected to, *first*, as incompetent and irrelevant generally; *second*, that the witness had

already testified that Mowry and the Indian woman were residing not in a white, but Indian community.

The plaintiff in this case, is alience of the alleged wife and daughter of William Mowry; he is, therefore, bound to establish title to the property in dispute by proof of lawful descent from William Mowry. Michael Daily, the witness called under this rejected offer, was in no way related to William Mowry, and could only testify to reputation of his marriage in the community in which Mowry lived with this Indian woman, from information coming from parties who were strangers to Mowry in blood.

Such testimony would be mere hearsay, coming from strangers; and, therefore, in a case like this, involving proof of title by descent, would be clearly incompetent.

Common reputation is only admissible and competent to prove marriage, pedigree and legitimacy when restricted to the relatives or family connections of the party from whom the descent is to be made out. The principle of admission and exclusion has been stated as follows:

"Common reputation, *in a family connection*, is admissible, when no superior evidence is attainable, or in connection with superior evidence, to prove pedigree, legitimacy and *marriage*. Such reputation may amount to hearsay upon hearsay; it may even be without a traceable authoritative source; but it is not for this reason to be excluded, *unless it should appear to come directly from strangers whose information would be only secondary*." 1 *Wharton's Evidence*, *sec.* 205.

The rule of admission and exclusion in cases of this kind is stated in 1 *Greenleaf on Ev.*, *sec.* 103, as follows:

"It is now *settled* that the law resorts to hearsay evidence in case of pedigree, upon the ground of interest of the declarants in the person from whom the descent is made out, and their consequent interest in knowing the connections of the family. The rule of admission is, therefore, restricted to the declarations of deceased persons, who were related by blood or marriage to the person, and, therefore, interested in the succession in question. And general repute, *in a family*, proved by a surviving member of it, has been considered as falling within the rule."

There is no valid objection to such evidence, because it is hearsay upon hearsay, provided *all the declarations are within the family.* Doe vs. Griffin, 15 *East*, 29; 1 *Greenleaf on Ev., sec.* 103, *note* 1.

"It is frequently said, that *general reputation* is admissible to prove the fact of the marriage of the parties alluded to, even in ordinary cases where pedigree is not in question. In one case, indeed, such evidence was, after verdict, held sufficient, *prima facie*, to warrant the jury in finding the fact of marriage, the adverse party not having cross-examined the witness, nor controverted the fact by proof. But the evidence produced in the other cases, cited in support of this position, cannot properly be called hearsay evidence, but was strictly and truly original evidence of *facts*, from which the marriage might well be inferred; such as evidence of the parties being received into *society* as man and wife, and being visited by respectable families in the neighborhood, and of their attending church and public places together as such, and otherwise demeaning themselves in public and addressing each other as persons actually married." 1 *Greenleaf's Evidence, sec.* 107.

To the admissibility of declarations, when offered as authoritative in pedigree, it is essential that they should be

made by lawful relatives. Thus, the declarations of deceased servants and intimate acquaintances are rejected, even though coming under the head of dying declarations, nor are the declarations of illegitimate relatives received. 1 *Wharton's Evidence, Sec.* 202.

"The law resorts to *hearsay of relations* upon the principle of interest in the person from whom the descent is to be made out." Per Lord St. Leonards, *Shrewsbury Peerage*, 7 *H. L., Cases* 23.

In American Life Insurance & Trust Co. vs. Rosenagle, 77 *Penn'a St.*, 508, Mr. Justice Woodward, delivering the opinion of the court, says: "The term pedigree includes not only descent and relationship, but also the *facts* of birth, *marriage* and death, and the times when these events happened. These facts may be established by general repute *in the family*, proved by a surviving member of it, in all cases where they occur incidentally and in relation to pedigree:" (citing) 1 *Greenleaf Ev., secs.* 103, 104, and thus recognizing and affirming the rule of admission stated by Greenleaf.

In Hill vs Hill's Administrator, 32 *Penn'a St.*, 511, Mr. Justice Strong, delivering the opinion of the court says: "We do not enter upon the doubtful question whether marriage can be proved or disproved by reputation. It has been *asserted* that it can be, and in *one* case it was perhaps so ruled; Evans vs. Morgan, 2 *C. & J.*, 453. But it will be found, on the examination of the cases relied upon to support the doctrine, that the evidence received was *not of reputation, but of independent facts* from which a marriage might be inferred."

And in Blackburn vs. Crawford, 3 *Wall.*, 175, it was held: Though on a question of marriage and legitimacy, it is competent, in order to prove an heirship asserted, to give in evidence the declarations of any deceased member of *that* family to which the person from whom the estate descended belonged, yet it is *not* competent to give the declarations of a person belonging to another family, such person being connected with the person from whom the estate descends only by an *asserted* marriage between them.

It is, moreover, evident, that repute or general reputation of marriage, in the Indian community at Kawkawlin, in which the witness had already testified Mowry lived with this Indian woman, could relate only to marriage as known and understood in that community, and repute or general reputation, in that community would, therefore, amount, at most, to mere hearsay of an Indian marriage, entered into by these parties, according to the custom of the Indian community in which they lived. But an Indian marriage, entered into according to Indian custom, dissoluble at the will of either party, is not marriage at common law: [*vide* authorities *post*]; therefore, the offer made by the plaintiff to establish a legal presumption of a valid marriage between William Mowry and this Indian woman, by evidence of repute or common reputation in the Indian community in which they lived, was properly rejected as inadmissible and incompetent.

In reply to the allegations relating to alleged facts not appearing in the record before this court, contained in the argument in support of the first assignment of error, we affirm that the evidence offered by plaintiff and made part of his

bill of exceptions in this case, shows conclusively, that, so far as these parties at any time resided together, they did, in fact, reside together at Kawkawlin, in the cabin of an Indian and in an Indian community. And we submit that the record in the case fails to show any evidence or offer of evidence to prove that William Mowry and this Indian woman were admitted to the houses of respectable white families, or were visited by them, as husband and wife. Neither is it proved by evidence of record in the case, nor is it true in fact, that William Mowry's brother, or other relatives, at any time, recognised or treated this Indian woman as his lawful wife, or that Mowry himself introduced her as his lawful wife to his relatives or to his white acquaintances.

Assignments of Error II and IV. These assignments are based on the rejection of the plaintiff's offer to ask the alleged wife whether or not, at the time she gave Mowry's picture to her daughter Elizabeth, she told her whose picture it was; and to the refusal of the court to permit the plaintiff to prove by Elizabeth that at the time her mother gave her the picture she told witness it was the picture of her father, William Mowry; that he was a white man, and dead; and that her mother often talked to her about him.

It will be perceived that the alleged wife had already testified to the paternity of her daughter Elizabeth, and to the fact that she had given the picture to her daughter and whose picture it was. What she *said* to her daughter as to who her father was, &c., could add no additional strength to her testimony. Moreover, these declarations were no

part of the *res gestæ* but were a narrative of past occurrences. The rejected evidence was simply an alleged conversation between the two witnesses long after the death of William Mowry.

All declarations which are in the nature of a narrative of a past occurrence are inadmissible and incompetent. 1 *Wharton on Ev., sec.* 266; 1 *Greenleaf on Ev., sec.* 110. And it may be added that declarations are inadmissible if there be opportunity for concoction. 1 *Wharton's Evidence, marginal note to section* 261.

Assignment of Error III. This assignment is to the refusal to permit the plaintiff to show that the two strange ladies mentioned by the witness were Mrs. Birney and Mrs. Fitzhugh, the latter of kin to William Mowry and his mother, and that they wanted the witness to give them her daughter to take away to her grandmother, and offered the witness money at the same time.

How was this alleged conduct of the "two strange ladies" at all relevant to the issue? It was not shown, or offered to be shown, that they were acting by the authority or with the knowledge of Mowry's mother. Nor was evidence given, or offered, to show how they were related, if at all, to Mowry or his mother. Moreover, it was not shown, or offered to be shown, that these ladies were dead, or beyond the process of the court. The evidence therefore was clearly incompetent.

If the declarant is living, he must be produced: for if within the process of the court his declarations are inadmissible.

Pendrill vs. Pendrill, 2 *Str.*, 924.

Butler vs. Mountganet, 6 *Jur. Law, R. N. S.*, 77; 7 *H. of L., Cas.* 633.

Stegall vs. Stegall, 2 *Brock.*, 256.

White vs. Strothen, 11 *Ala.*, 720.

1 *Wharton's Evi.*, 215, *Note* 1.

Hill vs. Hill's Admistrators, *supra.*

ASSIGNMENT OF ERROR V. This assignment is to the refusal of the court to permit the plaintiff "to show by the witness, Elizabeth Isaacs, that her grandfather, Pero, now dead, talked to her frequently about her father, and told her that he was a white man, and that his name was William Mowry."

In reply to this assignment, it seems only necessary to say that the rule of admission in cases of pedigree, as hereinbefore stated, is restricted to the declarations of persons who were related to the person from whom the descent is to be made out, and therefore interested in the *succession* in question. Pero,—claimed to be the deceased grandfather of the witness,—was not related to William Mowry by blood, was not interested in the succession in question, and his declarations were consequently inadmissible and incompetent. Blackburn vs. Crawfords, *supra.*

"Admissibility has been held not to extend as far as to statements made by a wife's father." Shrewsbury Peerage, 7 *H. of L., Cas.* 23.

In the printed argument of the plaintiff in error it is made the subject of grave complaint that the court permitted the defendants to give evidence to show what the cus-

toms among the Indians were, at the time of Mowry's alleged marriage, in respect to commerce between the sexes; that their so-called marriages were dissoluble at the will of either party; and showing also the temporary and polygamous character of the Indian marriages in the Chippaway tribe. (See defendants' offers 3, 4 and 5, printed record pp. 37 and 38.)

It appeared that at the time of the alleged marriage, Pero and his daughter were pagan Indians belonging to the Chippaway tribe. Some of the plaintiff's witnesses had testified to declarations of Mowry that he was married "Indian fashion," or in the "Indian way." In view of this testimony and the general character of the plaintiff's proofs in respect to the alleged marriage, it seems to us, the evidence complained of was clearly admissible to show in what relation the parties actually stood to each other, and that it was not a case of marriage.

Of a so-called Indian marriage, entered into between a male and female of the Miami tribe, according to the customs of their tribe, while the parties were residing in Indiana, the Supreme Court of the latter State declared in Roche vs. Washington, 19 *Ind.*, 53, that it "was not a marriage according to the law of any Christian nation, but was simply and exactly a contract and state of concubinage."

In the State vs. Ta-cha-na-tah, 64 *N. C.*, 614, it was held by the Supreme Court of North Carolina, that "cohabitation between an Indian man and woman, according to the ancient customs of their tribe, which leave the parties free to dissolve the connection at pleasure, is not marriage."

So it was ruled by the Supreme Court of California, in Letters vs. Cady, *supra*, that a matrimonial arrangement, *temporary* in its *inception*, though actually enduring through life, is not to be viewed as a valid marriage.

Christianity is understood to prohibit polygamy, and therefore no Christian country would recognize *polygamous* marriages. *Story's Conflict of Laws, sec.* 114 *and sec.* 113 *a.*

Marriage, as understood in Christendom, is the voluntary union *for life* of one man and one woman, to the *exclusion of all others*. A marriage contracted in a country where *polygamy is lawful*, between a man and woman professing the Mormon faith, which allows polygamy, *is not a marriage* as understood in Christendom; and although it may be a valid marriage *lex loci*, and although at the time when it it was contracted both parties were single and competent to contract marriage, the English Matrimonial Court will not recognize it as a valid marriage, in a suit brought by one party against the other for the purpose of enforcing matrimonial duties, or obtaining relief for breach of matrimonial obligations.

Story's Conflict of Laws, sec. 113 *b.*

Hyde vs. Hyde, *Law Rep.*, 1 *P. & D.*, 130.

We see, therefore, how inconsiderate is that criticism of the rulings in question, which characterizes them as "more singular" than any ever "before laid down by a respectable court."

The attempt to excite sympathy on behalf of the plaintiff in error by the reference made in his brief to the

pathetic story of John Rogers—of sainted memory—and "the inhuman Chancellor Gardiner," who consigned him to the flames of martyrdom, is simply ludicrous. During William Mowry's life-time the Indian woman herself never pretended to stand to him in a wifely relation. Nor since his death did *she* ever assert that they were united as husband and wife. The present assault upon the defendants' title would never have been made if the woman had not fallen into the hands of the champertor who concocted and has engineered this litigation. Adopting the observation of this court in Re. Propeller Mohawk, 8 *Wallace*, 154, 162, we may say of the present suits that they were "instituted by a volunteer on a speculation," and therefore it is a matter for rejoicing "that upon the application of the principles of law governing" the cases "the experiment must fail."

M. W. Acheson,
J. S. Morrison,
Attorneys for Defendants in Error.

CHARGE TO THE JURY.

PER MCKENNAN, *Circuit Judge:*

Both parties claim the property which is the subject of these suits under Dr. Peter Mowry, and thence to William Mowry, one of his sons. The plaintiff is the alienee of the alleged wife and daughter of William Mowry, and the defendants are his mother's vendees, Mrs. Eliza Mowry, in whom the title of the property was vested if he died unmarried and without issue.

It s obvious, then, that the fundamental question in the case is, whether the Indian woman alleged to have been Mowry's wife was united to him by a valid marriage, and this is to be determined by the laws of the State where the marriage contract was made; so the plaintiff's counsel have requested me to instruct you in the second point submitted by them, and that point is accordingly affirmed.

The alleged marriage took place in the State of Michigan, in the latter part of the year 1845. From 1833, when the present State of Michigan was a Territory, down to the present time, a statute in relation to marriage has been in force, and during that period it has remained without essential change, so far as we are advised, and we have had the benefit of the knowledge and researches of learned counsel from that State on both sides of these cases. There has not been any judicial construction of that statute, or any determination of its effect upon the marriage contract not made in conformity with its requirements. The only case touching it to which we have been referred decides that in

so far as the age of consent is fixed by it, the common law is abrogated. We are therefore left without the guidance of an authoritative exposition to ascertain its meaning and declare its effect upon the marriage in question.

The sixth section of the act authorizes the solemnization of marriages by justices of the peace within the counties for which they are respectively chosen, and by resident or ordained ministers of any denomination, at any place within the State.

By the eighth section it is provided that "in the solemnization of marriage no particular form shall be required, except that the parties shall solemnly declare, in the presence of the magistrate or minister, and the attending witnesses, that they take each other as husband and wife. In every case there shall be at least two witnesses, besides the magistrate or minister, present at the ceremony."

The requirements of the section are imperative, and its meaning clear. It is expressly applicable to every case of the solemnization of marriage; or, in other words, the proposed creation of the marriage relation. No particular form is required to be observed in any case, but a magistrate or minister, as prescribed in the sixth section, and two witnesses shall be present, and before them the parties shall solemnly declare their assent to the contract.

The co-existence of both conditions is imperatively prescribed, and the fulfillment of each is therefore indispensable to the lawful creation of the marriage relation.

This construction of the section is confirmed by subsequent sections of the Act. Thus, the fourteenth section declares that "no marriage solemnized before any person

professing to be a justice of the peace or a minister of the gospel shall be deemed or adjudged to be void, nor shall the validity thereof be in any way affected on account of any want of jurisdiction or authority in such supposed justice or minister, provided that the marriage be consummated with a full belief on the part of the persons so married, or either of them, that they have lawfully been joined in marriage."

Does this not recognise the necessary presence of a minister or magistrate, invested with the jurisdiction defined in the sixth section of the Act, at the solemnization of the marriage, and declare in effect that only when it is solemnized in the presence of a person professing such character and authority, under a full belief of the persons so married, or either of them, that the pretended magistrate or minister was really such, it shall not be deemed or adjudged invalid? But if the false pretense was known before the nuptials, or was discovered before the consummation of the marriage, is not the indication clear that the marriage shall be deemed or adjudged to be void?

More certainly, then, would this result follow when the presence of either of these functionaries is wilfully pretermitted.

No less significant in this connection is the next section of the Act, which is in these words: "The preceding provisions, so far as they relate to the manner of solemnizing marriages, shall not affect marriages among the people called Friends or Quakers, nor marriages among the people called Mennonists, but such marriages may be solemnized in the manner heretofore used and practiced in their respective societies."

Now, this section is certainly not to be assumed to be meaningless, or intended to have been ineffective. What reason, then, can be assigned for its insertion, if it be not upon the hypothesis that the eighth section, to which it plainly refers, prescribed essential conditions in the ceremony of marriage, which were exclusive of all different modes of solemnizing it?

It is well known that among the Quakers at least, there were no ordained ministers, and that in the solemnization of marriage among them the agency of a minister or civil magistrate was not permitted.

According to their practice, marriage was contracted by the declared acceptance by a man and woman of each other as husband and wife in the presence of witnesses. This comprehended all that the common law required to constitute marriage, b it did not embrace all that the eighth section of the Act prescribes. Why, then, were these people relieved from the observance and requirements of this section, when they omitted but a single one—the presence of a minister or magistrate—if such an omission would not otherwise invalidate the contract?

Can there be any sufficient answer to this question other than this, that the fulfillment of all the requirements of the section was essential to the validity of marriage, but as the observance of one of them was not practicable among the Quakers, it was therefore necessary, to save the validity of their marriages, to exempt them from the operation of the section?

It is said, however, by some text writers, whose opinions are entitled to respect, that statutes regulating

marriages are not to be construed to avoid marriages contracted in violation of some of their provisions, unless the Acts contain express words of nullity. Although there is high authority against this statement of the law, it certainly has the apparent support of a number of decisions by courts of great respectability. But it should be predicated of what, in the sense of the statute, may be treated as irregularities, and of a non-observance of provisions simply directory, not of a disregard of conditions prescribed to be performed when the contract of marriage is made, and which constitute essential elements of the mode of its solemnization.

The Supreme Court of Pennsylvania has gone beyond this, but not for the reason upon which the rule is stated to rest, declaring that the Colonial Acts of 1700 and 1729 had outlasted their adaptation to the habits and customs of society. They gave a constructive effect to a clause in those acts substantially like the eighth section of the Michigan statute, confessedly against its natural import, that they might thereby avert the extended social mischief which would result from its rigid execution. (Radebaugh vs. Sanks, 2 *Watts*, 11.)

But this court has no such dispensing power with regard to the Michigan statute. It is not so old that it has grown into disuse. It is a cherished feature of the policy of the State in reference to a subject which it has wisely undertaken to regulate. Whatever its true import is must be accepted by other tribunals, at least, as its intended meaning; and effect must be given to it accordingly.

If the jury, therefore, find that neither a minister nor a magistrate was present at the alleged marriage of William Mowry and the daughter of the Indian Pero—and such is the plaintiff's own proof—they are instructed that such marriage was invalid under the Michigan statute, and their verdict in such case should be for the defendants.